No. 16-1498	
Title:	**Washington State Department of Licensing, Petitioner** **v.** **Cougar Den, Inc.**
Docketed:	June 16, 2017
Lower Ct:	Supreme Court of Washington
Case Numbers:	(92289-6)
Decision Date:	March 16, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 14 2017	Petition for a writ of certiorari filed. (Response due July 17, 2017)
Jul 13 2017	Order extending time to file response to petition to and including August 16, 2017.
Jul 17 2017	Brief amici curiae of The States of Idaho, et al. filed.
Jul 17 2017	Brief amici curiae of Washington Oil Marketers Association, et al. filed.
Aug 16 2017	Brief of respondent Cougar Den, Inc. in opposition filed.
Aug 16 2017	Brief amicus curiae of Confederated Tribes and Bands of the Yakama Nation filed.
Aug 29 2017	Reply of petitioner Washington State Department of Licensing filed. (Distributed)
Aug 30 2017	DISTRIBUTED for Conference of 9/25/2017.
Oct 02 2017	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 15 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.

May 30 2018	Supplemental brief of respondent Cougar Den, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED.
Aug 09 2018	Brief of petitioner Washington State Department of Licensing filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 09 2018	Joint appendix filed. **Main Document**
Aug 15 2018	Brief amici curiae of The Washington Oil Marketers Association and the Washington Association of Neighborhood Stores filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 16 2018	Brief amici curiae of Multistate Tax Commission and Federation of Tax Administrators filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 16 2018	Brief amici curiae of The States of Idaho, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 16 2018	Brief amici curiae of Public Health Organizations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 16 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Aug 17 2018	Motion for an extension of time to file respondent's brief on the merits filed. **Main Document**
Aug 20 2018	SET FOR ARGUMENT on Tuesday, October 30, 2018
Aug 24 2018	Motion to extend the time to file respondent's brief on the merits granted and the time is extended to and including September 17, 2018.
Sep 10 2018	Record requested from the Supreme Court of Washington.
Sep 12 2018	CIRCULATED

Sep 12 2018	Brief amicus curiae of Sacred Ground Legal Services filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief of respondent Cougar Den, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 21 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 24 2018	Brief amici curiae of Nez Perce Tribe, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Brief amici curiae of Confederated Tribes and Band of the Yakama Nation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 24 2018	Brief amicus curiae of National Congress of American Indians filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kavanaugh took no part in the consideration or decision of this motion.
Oct 17 2018	Reply of petitioner Washington State Department of Licensing filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 18 2018	Record received from the Supreme Court of Washington is electronic and located on PACER.
Oct 30 2018	Argued. For petitioner: Noah Purcell, Washington State Solicitor General, Olympia, Wash.; and Ann O'Connell, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Adam G. Unikowsky, Washington, D. C.

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RECORD
AND
BRIEFS

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In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

An 1855 treaty between the United States and the Yakama Indian Nation provides members of the tribe "the right, in common with citizens of the United States, to travel upon all public highways." In a series of cases, the Ninth Circuit has rejected claims that this language exempts the Yakama from taxes or state fees on off-reservation commercial activities, holding instead that the language is limited to securing for tribal members a right to travel on public highways without paying a fee for that use or obtaining state approval. In this case, however, the Washington Supreme Court interpreted the treaty far more broadly, holding that it implicitly prohibits states from taxing "any trade, traveling, and importation" by the Yakama, even off-reservation, "that requires the use of public roads." The court therefore held that the treaty preempts Washington from imposing wholesale fuel taxes on Respondent Cougar Den, a Yakama-owned fuel distributor that imports millions of gallons of fuel into Washington annually for sale to the general public.

The question presented is:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

PARTIES

The Washington State Department of Licensing is the Petitioner and was the appellant in the Washington Supreme Court.

The Respondent is Cougar Den, Inc., and is a company incorporated under the laws of the Yakama Indian Nation. Cougar Den, Inc., was the respondent in the Washington Supreme Court.

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INTRODUCTION

The Washington Supreme Court's ruling below adopts a treaty interpretation antithetical to the Ninth Circuit's reading of the same provision, uses an approach long rejected by this Court, and will cost Washington (and likely other States) hundreds of millions of dollars. This Court should grant certiorari.

Respondent Cougar Den is a wholesale fuel distributor owned by a member of the Yakama Indian Nation. Since 2013, Cougar Den has used a non-Indian contractor to import millions of gallons of fuel into Washington every year for resale, without a fuel distributor license. Cougar Den refuses to pay state tax on the fuel. It is undisputed that the tax's incidence is outside the Yakama Reservation.

Cougar Den claims that it is exempt from state taxes on trade under Article III of the 1855 treaty between the Yakama Nation and the United States, which provides tribal members "the right, in common with citizens of the United States, to travel upon all public highways." The Ninth Circuit has rejected this argument as to both state cigarette fees and federal fuel taxes. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015); *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003). Instead, the Ninth Circuit has held that the treaty exempts Yakama members only from fees charged for using the highways (such as truck permitting fees) and from obtaining state approval prior to using the highways. *See Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). The Ninth Circuit has

explicitly rejected the idea that Article III creates a "right to trade" off the reservation free from state taxes. *King Mountain*, 768 F.3d at 998.

Contradicting these Ninth Circuit holdings, the Washington court ruled for Cougar Den, granting it a massive tax exemption. It found that the Yakamas' treaty "right, in common with citizens of the United States, to travel upon all public highways," implicitly exempted Cougar Den from state wholesale fuel taxes, even though the tax "is assessed regardless of whether Cougar Den uses the highway" and no Yakama transported the fuel. App. 13a-14a. The court inferred this new right "[b]ased on the historical interpretation of the Tribe's essential need to travel." App. 16a.

The Washington Supreme Court's untenable interpretation of a federal treaty cries out for this Court's review. It not only conflicts with the Ninth Circuit's reading of the same language, but it also infers a tax exemption despite this Court repeatedly holding that "Indians going beyond reservation boundaries" are subject to non-discriminatory state taxes "[a]bsent *express* federal law to the contrary," and that "tax exemptions are not granted by implication." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 156 (1973) (emphasis added). The ruling will cost Washington hundreds of millions of dollars in fuel tax revenue and means that whether any other state tax—including cigarette taxes—is preempted as to the Yakama will now depend primarily on whether the tax is challenged in state or federal court. No State should face this dilemma, certainly not based on a state court's atextual approach to treaty interpretation long-rejected by this Court. The Court should grant certiorari.

OPINIONS BELOW

The Washington Supreme Court opinion is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). App. 1a-29a. The order of the superior court is unreported. App. 30a-43a. The administrative order of the Director of the Department of Licensing is unreported. App. 44a-61a.

JURISDICTION

The Washington Supreme Court entered its opinion on March 16, 2017. App. 1a. The opinion is a final judgment and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES

Article III of the Yakama Treaty of 1855 states:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty With the Yakamas, art. III, ¶ 1, 12 Stat. 951, 952-53 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

STATEMENT OF THE CASE

A. Washington's Motor Vehicle Fuel Tax

Washington, like other states, taxes motor vehicle fuels. Wash. Rev. Code 82.36 (gasoline);

Wash. Rev. Code 82.38 (diesel fuel);[1] App. 4a; 51a. Washington imposes its tax when wholesale fuel is removed from bulk storage (such as when a tanker truck obtains fuel from a refinery), or when wholesale fuel in a tanker truck or rail car "enters into this state" after being removed from bulk sources outside the state. Wash. Rev. Code § 82.36.020(2)(c); Wash. Rev. Code § 82.38.030(7)(c); App. 51a-52a ("Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state."). The tax does not apply to those who transport fuel; it applies to the wholesale fuel supplier or distributor, regardless of how the fuel is transported, whether by rail, tanker truck, barge, pipeline, or otherwise. *See* Wash. Rev. Code § 82.36.020; Wash. Rev. Code § 82.38.030. Most states impose this type of tax at the wholesale level.[2]

Washington collects its fuel taxes through a license system administered by the Department of Licensing. App. 52a; Wash. Rev. Code § 82.36.080; Wash. Rev. Code § 82.38.090. When licensed fuel distributors purchase wholesale fuel from a bulk facility within Washington (typically a refinery or tank farm), the seller pays the tax. Wash. Rev. Code § 82.36.026; Wash. Rev. Code § 82.38.035. But if a

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[1] Citations refer to the 2013 Revised Code of Washington, in effect when the events in this case occurred. In 2016, Wash. Rev. Code 82.36 and Wash. Rev. Code 82.38 were merged without substantive change into a single chapter, Wash. Rev. Code 82.38. *See* 2013 Wash. Sess. Laws, page nos. 1322-1405 (ch. 225); 2015 Wash. Sess. Laws, page no. 1178 (ch. 228, § 40).

[2] Fed'n of Tax Admins., *State Motor Fuel Tax Points of Taxation Charts*, https://www.taxadmin.org/assets/docs/Motor Fuel/other-data/2012_pointstax.pdf.

distributor buys wholesale fuel from a bulk facility outside Washington and brings it into the State, then the tax applies when that fuel enters Washington and the distributor pays the tax after bringing the fuel into the State. App. 53a; Wash. Rev. Code §§ 82.36.026, .031, .035; Wash. Rev. Code §§ 82.38.030(9)(b), (c), .035(3). If an unlicensed person deals in wholesale fuel, the tax applies plus a penalty for acting without a license. App. 53a; Wash. Rev. Code §§ 82.36.100, .045, .080; Wash. Rev. Code § 82.38.170(6). The Department may assess taxes, penalties, and interest if it finds that taxes have been avoided. App. 53a; Wash. Rev. Code § 82.36.045; Wash. Rev. Code § 82.38.170. A Department assessment may be challenged in an agency hearing, followed by judicial review under the state Administrative Procedure Act, which occurred in this case. App. 53a.

Washington adopted its current fuel tax structure in 2007, after a federal district court ruled that the prior version of the statutes put the incidence of the tax on fuel retailers (gas stations). That ruling affected collection of taxes on fuel sold at Indian-owned gas stations within Indian reservations. App. 20a-22a. The 2007 amendments moved the incidence of the tax up the supply chain to persons who supply the fuel to retailers. *See* 2007 Wash. Sess. Laws, page nos. 2426, 2436 (ch. 515, §§ 20, 33) ("the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state"); Wash. Rev. Code § 82.36.022; Wash. Rev. Code § 82.38.031; App. 21a-22a; *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) ("[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or

Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence."). As a result, since 2007 Washington fuel taxes have mirrored the tax upheld in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (Kansas fuel tax imposed outside Indian country on fuel wholesalers is valid notwithstanding economic effect on tribal gas station within Indian country).

B. Cougar Den Is a Yakama Indian Owned Company that Did Not Pay State Taxes on Wholesale Fuel Brought into Washington

The Yakama Nation is a federally recognized Indian tribe. App. 62a-63a; *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). It is the successor in interest to tribes and bands that executed a treaty in 1855 to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them" in Washington Territory. Treaty with the Yakamas, art. I, 12 Stat. 951, 951 (1855). In Article II, the treaty reserved a tract known today as the Yakama Indian Reservation. 12 Stat. at 952. Roughly twenty percent of the reservation's 1.3 million acres are owned in fee by individual land-owners, with the remainder held in trust by the United States. *Brendale*, 492 U.S. at 415. "Most of the fee land is found in Toppenish, Wapato, and Harrah," three state-incorporated cities located within the reservation. *Id.* "The remaining fee land is scattered throughout the reservation in a 'checkerboard' pattern." *Id.* State highways and county roads funded by state fuel taxes serve these cities and the reservation. *See* Wash. Rev. Code § 46.68.090.

Respondent Cougar Den is owned by a Yakama member and incorporated under Yakama law. App. 2a, 63a (Stip. Facts 5-7). It has never applied for or held a Washington license to distribute wholesale fuel. App. 49a, 63a. It obtained an Oregon fuel dealer license in 2012 and used it to purchase wholesale fuel in Portland, Oregon. App. 63a, 64a. Cougar Den avoided paying Oregon fuel taxes by representing that its fuel would be exported wholesale across the state line into Washington under a tribal license. *See* Or. Rev. Stat. § 319.240. Cougar Den stipulated that it wholesaled millions of gallons of fuel in a matter of months without paying Washington state taxes. App. 64a (Stip. Facts 12-14). Cougar Den contracted with KAG West, a non-tribal company and subsidiary of North America's largest tank truck transporter, to transport its fuel from Oregon to Washington in KAG West's trucks. App. 40a. In this case, Cougar Den sold its fuel to Yakama-owned retail gas stations in Wapato, within the Yakama Reservation. App. 50a. Those stations sold the fuel to the general public. App. 50a.

After learning that Cougar Den brought millions of gallons of fuel into Washington without paying taxes, the Department assessed $3.6 million in taxes, penalties, and interest for wholesale fuel activities between March 2013 (when Cougar Den started its wholesale operation) and October 2013. App. 49a. Cougar Den continued to bring untaxed wholesale fuel into Washington and deliver it to retail stations without paying taxes. The Department continued to assess taxes, and later assessments are stayed in various administrative or judicial reviews, involving tens of millions of dollars in

avoided taxes. Similarly situated Yakama-owned businesses have expanded operations into California, shipping untaxed fuel to several Indian reservations there. App. 28a.

C. The Department of Licensing Rejected Cougar Den's Treaty Defense to Taxation in an Administrative Proceeding

In an administrative hearing challenging the assessment, Cougar Den raised only legal issues. It did not dispute that the tax applied outside the reservation or the amount that would be owed. But it claimed the tax violated Article III of the treaty, which provides for a "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at 953.

The Director of Licensing entered a final order rejecting Cougar Den's argument that the treaty encompassed a right to trade in untaxed fuel. App. 56a-58a. The order relied on three legal conclusions. First, the "Structure of Washington Fuel Tax Laws" showed that the tax was imposed on wholesale fuel distributors outside the reservation. App. 51a-53a. Cougar Den did not dispute this conclusion. Second, the order relied on this Court's rule that "[o]utside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary." App. 54a (citing *Mescalero*, 411 U.S. at 48-49). Third, the order examined prior federal decisions concerning the treaty right to travel on highways. Relying on those decisions, the order held that no treaty language expresses a right to engage in wholesale fuel trading free from the state's tax and without the required

license. App. 56a-58a. The taxes do not violate a treaty right because they "are not a charge for Cougar Den's use of public highways" but relate to the wholesale fuel itself. App. 58a.[3]

D. The Washington Supreme Court Holds that the Yakama Have a Right to Trade Wholesale Fuel Outside Reservation Boundaries that Preempts State Taxation

Cougar Den sought judicial review of the final order, challenging the legal conclusions concerning the meaning of the treaty. A superior court agreed with Cougar Den, ruling that the treaty "shields the transport of fuel, owned by Cougar Den," if fuel is moved on public highways from Oregon "across the Columbia River and into the State of Washington." App. 39a. The Department appealed directly to the Washington Supreme Court. The Yakama Nation appeared as amicus, endorsed Cougar Den's positions, and argued on its behalf.

The Washington Supreme Court affirmed the superior court in a divided decision. Moving quickly past the treaty language, the majority focused on how it thought the Yakama would have understood the treaty when it was signed. App. 6a-9a, 16a. In doing so, the majority relied primarily on the district court and appellate opinions in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). *Cree* involved "various Washington truck license and overweight permit fees," i.e., fees

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[3] Cougar Den first presented its arguments to an administrative law judge, who issued an initial order in Cougar Den's favor. App. 44a. On review, the Director reversed and upheld the tax. App. 59a.

paid in order to use highways. *Id.* at 764. There, the Ninth Circuit held, based on the Yakamas' treaty-time understanding, that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added). The majority recognized that this case was different because here "the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. But the Court held that this was "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a.

To support expanding *Cree*'s holding beyond fees for using a highway, the majority cited *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), calling it "nearly identical to this case." App. 13a. *Smiskin* rejected prosecution of two Yakama members under the Federal Contraband Cigarette Trafficking Act, which makes it illegal to possess or transport cigarettes without paying state taxes or complying with state law. Washington law allows transport of untaxed cigarettes only if the transporter gives the State advance notice. The Ninth Circuit held that "applying the State's pre-notification requirement to the Smiskins violates the right to travel guaranteed in Article III of the Treaty." *Smiskin*, 487 F.3d at 1264. The majority deemed *Smiskin* controlling because "[i]n both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The majority sought to distinguish *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015). *King Mountain* involved a Yakama-owned cigarette company that grew tobacco on the reservation, shipped it to Tennessee and North Carolina for processing and blending, then back to the reservation where it was made into cigarettes the company sold "throughout Washington and in about sixteen other states." *Id.* at 994. The company argued that Article III of the Treaty exempted it from paying escrow fees the State imposes on cigarette manufacturers. The Ninth Circuit rejected that reading: "the Treaty is not an express federal law that exempts King Mountain from state economic regulations." *Id.* at 994. The Ninth Circuit also held that there was no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995.

The majority below dismissed *King Mountain*, asserting that "travel was not at issue" in that case. App. 13a. The majority reasoned that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." App. 13a. But, the majority concluded, "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

Chief Justice Fairhurst and Justice Wiggins dissented, finding that the majority's reasoning contradicted Ninth Circuit precedent and would create a giant hole "in Washington's ability to tax goods consumed within the state, without legal basis." App. 17a.

The dissent pointed out that the majority decision conflicted with the Ninth Circuit's rulings on the same treaty provision. The dissent explained that "*Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true." App. 24a. "Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted by the Yakama Nation's treaty right to travel." App. 24a (citing *King Mountain*, 768 F.3d at 997-98).

The dissent also noted that King Mountain had made the same argument as Cougar Den, claiming that the treaty right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade,'" which includes a treaty right to bring goods to market unrestrained by the laws of the states. App. 25a (alterations in original) (quoting *King Mountain*, 768 F.3d at 997). But the Ninth Circuit rejected it, holding the right to travel did *not* carry with it a right to avoid regulation or taxation of trade; it only "'guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees for

that use.'" App. 25a (quoting *Cree v. Flores*, 157 F.3d at 769).

The dissent also pointed out the further conflict with *King Mountain*'s holding that the treaty language was unambiguous and could not be read to create a "right to trade" that preempted economic laws of the states. App. 25a. The dissent concluded that wholesale fuel excise taxes are indistinguishable from the tobacco escrow payments challenged in *King Mountain*, because neither burdened travel on highways and both imposed financial burdens on goods. App. 26a. This distinction could not be avoided simply by transporting goods because "[w]ithout travel, most goods have no market." App. 26a. "The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation." App. 26a.

The dissent concluded that the majority "puts at risk . . . Washington's, and potentially other states', ability to tax goods consumed within its borders." App. 27a (citing avoidance of California fuel excise tax by a Yakama Indian fuel dealer). Moreover, "[n]othing indicates any of the parties understood the Treaty of 1855 to provide for such a right." App. 28a.

REASONS WHY THE PETITION SHOULD BE GRANTED

A. The Washington Supreme Court and Ninth Circuit Are Split on Whether this Treaty Creates a Right to Trade Without State Economic Regulation or Taxes

The Washington Supreme Court and the Ninth Circuit have addressed the same language

in the same treaty but reached completely different conclusions. The Ninth Circuit held that "the Treaty is not an express federal law that exempts [Yakama businesses] from state economic regulations," including taxes and state charges directed at goods sold by Yakamas. *King Mountain*, 768 F.3d at 994. Indeed, the Ninth Circuit held that the treaty language is unambiguous and leaves no room to rewrite it based on allegations about historical understandings. In contrast, the Washington Supreme Court, relying entirely on inferences and alleged historical understandings, held below that "any trade, traveling, and importation that requires the use of public roads" by the Yakama is exempt from taxation under the treaty. App. 16a. As a result, the state court granted Cougar Den an exemption from taxes on wholesale fuel that apply off-reservation and "regardless of whether Cougar Den uses the highway." App. 13a-14a. This genuine conflict and its significant impact on state revenues should be resolved by this Court.

1. The Ninth Circuit interprets this treaty to allow use of highways without paying "fees for that use" or advance notice, but not to preempt other taxes or regulations

The Ninth Circuit has interpreted the treaty language at issue here several times. It has held that the treaty preempts a state tax imposed *for using highways* and requirements that the Yakama obtain state approval prior to traveling, but that the treaty does not preempt other charges, taxes, or regulations directed at goods themselves, like those at issue here.

The Ninth Circuit first interpreted this treaty language in *Cree v. Waterbury*, 78 F.3d 1400, 1402 (9th Cir. 1996) ("No prior decision has interpreted the Treaty's highway right."). It rejected the district court's ruling that the meaning of Article III had already been determined in cases interpreting other sections of the treaty. *Id.* at 1403-04. It remanded to the district court for it "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.* at 1405.

The district court conducted that inquiry and the case returned to the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Based on extensive consideration of the treaty's language, *id.* at 769-72, and the district court's factual findings, *id.* at 772-73, the court held that the treaty right to travel on highways preempted "various Washington truck license and overweight permit fees," i.e., "fees imposed for use of the public highways," when Yakamas used highways to transport logs to off-reservation mills. *Id.* at 764, 768. The court explained that this "guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of *fees for that use*." *Id.* at 769 (emphasis added).

The Ninth Circuit, however, quickly made clear that this treaty right was limited and did not extend even to federal highway taxes. In *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003), the United States had assessed Kip Ramsey (Cougar Den's owner) for unpaid taxes for using heavy trucks and diesel fuel on public highways

in his logging business. Ramsey challenged the taxes, invoking the right to travel provision and arguing that *Cree* controlled. The Ninth Circuit disagreed. The court held that a different approach to treaty interpretation applies depending on whether a state or federal tax is at issue. *Ramsey*, 302 F.3d at 1078. As to both types of tax, "tax laws applied to Indians outside of Indian country . . . are presumed valid absent express federal law to the contrary." *Id.* at 1077 (internal quotation marks omitted). With a federal tax, the court said, there must be "express exemptive language" in the treaty before the court even considers canons of construction to determine whether "the exemption applies to the tax at issue." *Id.* at 1079. By contrast, the court said, when a court evaluates a state tax, "there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians." *Id.* at 1079. Applying this standard, the court held that the treaty "contains no 'express exemptive language'" and thus creates no treaty right to avoid federal taxes on fuel used by trucks on the highway. *Id.* at 1080.[4]

The Ninth Circuit also limited its reasoning in the only other case in which it has found preemption of state law under the Article III right to travel on public highways. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the court held that the

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[4] The State is unaware of any other Circuit applying this rule that courts should take a different approach to interpreting treaties depending on whether a state or federal tax is at issue. Ultimately this idiosyncratic rule makes no difference to the conflict here, because the Washington Supreme Court's decision conflicts with the Ninth Circuit's approach even as to *state* taxes, as demonstrated by the *King Mountain* decision.

treaty guaranteed the Yakamas the right to travel on public highways without obtaining prior approval from the State. *Smiskin*, 487 F.3d at 1267. The court therefore held that the treaty barred prosecution of two Yakama members for transporting unstamped (i.e., untaxed) cigarettes without first notifying the State. *Id.* at 1267. Importantly, the *Smiskin* court never suggested that the treaty preempted state cigarette tax as to the Yakama, only that it preempted the requirement of providing notice in advance of using a highway. *See also United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (the treaty did not preempt prosecution of a Yakama for conspiring to violate federal law by agreeing to transport unstamped cigarettes in violation of state law, because the untaxed cigarettes were contraband).

The Ninth Circuit summarized and further clarified the scope of the treaty right in its most recent decision addressing Article III. In *King Mountain*, 768 F.3d 989, the court considered whether the treaty preempted a state fee that tobacco manufacturers had to pay on each unit of cigarettes they sold to help offset the long-term healthcare costs created by tobacco use. *Id.* at 991-92. King Mountain was a Yakama-owned tobacco manufacturer that engaged in extensive interstate trade as part of its manufacturing process, *id.* at 991, and it argued that Article III of the Treaty and *Smiskin* exempted it from paying into the escrow fund.

The Ninth Circuit emphatically rejected this argument. The court first underscored that regardless of whether a state or federal tax is at issue, the key question in assessing whether a treaty preempts a tax applied off-reservation is whether "an express federal

law" exempts the tribal "business from state regulation." *King Mountain*, 768 F.3d at 994. The court noted that because a state tax was at issue, it would consider canons of construction in assessing whether the treaty amounted to an "express federal law" exempting King Mountain from tax. *Id.* at 995. But it emphasized that "the canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *Id.* (alterations in original) (quoting *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)). Applying this principle, the court found no need to "engage in an exhaustive review of the meaning the Yakama would have given to the Treaty as of 1855" because "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 994, 995. While "the plain text of Article III . . . reserved to the Yakama the right 'to travel upon all public highways,'" nothing in the treaty's text created a "right to trade" free of state taxes or regulations. *Id.* at 997. Thus, no alleged "meaning to the Yakama people [could] overcome the plain and unambiguous text of the Treaty." *Id.* at 998. This Court denied certiorari after the Yakama Nation urged that the Ninth Circuit's reliance on language was contrary to this Court's precedent. *Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542 (No. 14-947, Petition for Writ of Certiorari denied Mar. 9, 2015).

The Ninth Circuit has thus made clear its view of the limits to this treaty right, rooted in the Treaty's text. The Treaty guarantees Yakama members a "right to travel" that exempts them from paying state fees for using the highways or obtaining state approval to use the highways. *Cree v. Flores*, 157 F.3d at 764; *Smiskin*, 487 F.3d at 1264. But the Treaty is not an express federal law exempting the Yakama from taxes incidental to trade, even if the trade makes use of the highways, because the Treaty contains no "right to trade" free of taxes. *King Mountain*, 768 F.3d at 998; *Ramsey*, 302 F.3d at 1080. Under this reasoning, the Treaty would not preempt the wholesale fuel tax at issue here because, as even the majority below acknowledged, the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.[5]

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[5] District courts have consistently applied the Ninth Circuit view during the past decade. In *United States v. King Mountain Tobacco Co., Inc.*, No. 1:14-cv-3162-RMP, 2015 WL 4523642 (E.D. Wash. July 17, 2015), *appeal docketed*, No. 16-35956 (9th Cir. Nov. 17, 2016), the company objected to assessments under the federal Fair and Equitable Tobacco Reform Act. The court held that the assessments "do not constitute a 'restriction' or 'condition' on the use of public highways." *Id.* at *15. "[T]he Yakama Treaty does not guarantee the right to trade unencumbered." *Id.*

The same court also rejected, twice, the argument that a federal excise tax on tobacco interfered with "free access . . . to the nearest public highway" under the treaty, saying that the Yakama Indian was "not being taxed for using on-reservation roads. It is being taxed for manufacturing tobacco products." *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061, 1068 (E.D. Wash. 2014) (quoting *Ramsey*, 302 F.3d at 1076-77), 1069, *vacated on other grounds sub nom. Confederated Tribes & Bands of the Yakama*

2. The Washington Supreme Court creates a conflict by declaring that "any trade, traveling, and importation that requires the use of public roads" cannot be taxed

The Washington Supreme Court majority's view of the treaty is diametrically opposed to the Ninth Circuit's. This leads to its contrary result, holding that the State's wholesale fuel tax is preempted as to Cougar Den even though it is undisputed that the tax applies "regardless of whether Cougar Den uses the highway." App. 13a-14a.

The Washington court began its opinion by acknowledging that "[a]bsent express federal law to the contrary," Indians going beyond reservation boundaries are subject to non-discriminatory state taxes. App. 17a (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). And it recognized that the tax at issue here is non-discriminatory and its incidence is off-reservation. *Id.* at 4a-5a.

In finding that the Treaty amounted to "an express federal law" preempting state taxes, however, the court quickly skipped over the Treaty's actual language and went directly to exploring how the Yakama allegedly would have understood it

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Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau, 843 F.3d 810 (9th Cir. 2016); *United States v. King Mountain Tobacco Co., Inc.*, No. CV-12-3089-RMP, 2014 WL 279574 (E.D. Wash. Jan. 24, 2014), *appeal docketed*, No. 14-36055 (9th Cir. Dec. 11, 2014); *see also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1267-68 (E.D. Wash. 2010) (rejecting claim that treaty preempts state taxes on cigarettes), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011).

historically. App. at 5a. This was contrary to both this Court's approach (as explained in Part B, below) and the Ninth Circuit's. *See King Mountain*, 768 F.3d at 997 ("As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed."); *Ramsey*, 302 F.3d at 1080 ("[T]here is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes."); *Cree v. Flores*, 157 F.3d at 770 (trial court "evaluated the public highways clause on its own and in terms of the Treaty as a whole"); *Cree v. Waterbury*, 78 F.3d at 1403 ("To determine the parties' intent, the court must examine the treaty language as a whole, the circumstances surrounding the treaty, and the conduct of the parties since the treaty was signed."). Thus, the state court never mentioned that the treaty says nothing about a right to trade or to avoid taxes on goods, or any words suggesting an exception to future state or federal laws governing trade using highways. But by using this approach, untethered from text, the state court declared a treaty right far broader than any recognized by the Ninth Circuit: "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a.

The state court sought to justify its holding based on readings of Ninth Circuit opinions that are irreconcilable with those opinions and that the Ninth Circuit itself repudiates. The state court split from the Ninth Circuit's holdings in three crucial respects.

First, the Washington court cited *Cree* to assess the Yakamas' alleged understanding of the treaty and

to find an implied "right to trade" free of state taxes. App. 6a-9a. But the issue in *Cree* was limited to a tax imposed for using the highway. *Cree v. Flores*, 157 F.3d at 765. Here, the majority acknowledged that the tax is not for using the highway, but rather is for engaging in distribution and sale of wholesale fuel. App. 14a. As to this type of tax, which is not directly related to highway use, the Ninth Circuit has made clear that no resort to historical analysis is necessary because nothing in the treaty language can be interpreted as creating an exemption from such a tax. *King Mountain*, 768 F.3d at 994-95, 998.

Second, the state court made pervasive misuse of *Smiskin*. The state court relied on dicta in *Smiskin* describing a "right to travel outside reservation boundaries, *with no conditions attached*." App. 10a (citing *Smiskin*, 487 F.3d at 1266 (emphasis in *Smiskin*)). But the "condition" at issue in *Smiskin* was *not* taxation of cigarettes—the court never suggested that the State's taxes were invalid; the condition was requiring notice before using a highway. *Smiskin*, 487 F.3d at 1264 ("critical question" is whether applying state "pre-notification requirement to Yakama tribal members who possess and transport unstamped cigarettes violates the Yakama Treaty of 1855"); *King Mountain*, 768 F.3d at 998 (reading *Smiskin* as concerning a notice "requirement" that "imposes a condition on travel").[6] The state court treats this

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[6] *See also Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, No. CV-08-3056-RHW, 2010 WL 9113878 (E.D. Wash. Order dated Nov. 9, 2010) (*Smiskin* held "only that the prenotification requirement in particular impermissibly infringed on Yakamas' right to travel"), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011); App. 24a (dissent).

phrase in *Smiskin*, however, as though it declared a nearly infinite treaty right to avoid anything directed at trade while traveling, by holding that a tax or regulation of property transported over a highway is a "condition" on travel. App. 10a (quoting *Smiskin*).

The state court's strained reading of *Smiskin* cannot be reconciled with *King Mountain*, which rejected this same argument and held that paying escrow charges on cigarettes is not a "condition" or restriction on travel under the treaty. *King Mountain*, 768 F.3d at 997 (rejecting argument that *Smiskin* and *Cree* prohibit "imposition of economic restrictions or pre-conditions on the Yakama people's Treaty right to engage in the trade of tobacco products"). There is thus no merit to the state court majority's conclusion that "*Smiskin* is nearly identical to this case." App. 13a. Read fairly and in light of subsequent cases, *Smiskin* provides no support for the state court holding that a tax on wholesale fuel inventories is a "condition on travel that affect[s] the Yakamas' treaty right to transport goods to market without restriction." App. 13a.

The state court's final and most glaring conflict with Ninth Circuit precedent has to do with *King Mountain*. The Washington court quickly dispensed with *King Mountain*, opining that "[t]he difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue." App. 13a. The Ninth Circuit opinion in *King Mountain* refutes that statement. "King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in North Carolina where more tobacco is purchased and blended with reservation tobacco." *King Mountain*, 768 F.3d at 994. King

Mountain then has its tobacco "sent back to the reservation, where much of it is made into cigarettes. King Mountain sells its tobacco products throughout Washington and in about sixteen other states." *King Mountain*, 768 F.3d at 994.

If *King Mountain* did not sufficiently involve travel, then neither does this case, which involves simple importation of fuel from Oregon into Washington. The wholesale fuel tax and the charges and taxes on tobacco are equally directed to Yakama-owned goods transported over the same highways. Indeed, the majority opinion admitted that highway use is entirely incidental to the fuel tax because the tax applies "regardless of whether Cougar Den uses the highway." App. 13a. The majority then found the absence of taxation related to highway use "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." App. 14a. The majority did not explain how this point distinguished this case from *King Mountain*, while the dissent pointed out how this was no distinction at all because virtually all goods require transportation to be marketed. App. 26a.

In short, under *King Mountain*, the Ninth Circuit would have upheld application of the State's wholesale fuel tax to Cougar Den. Yet the Washington court found the tax preempted and declared a far broader treaty right than the Ninth Circuit has ever recognized. This conflict warrants this Court's review. No other court can reconcile these starkly different results and eliminate the resulting harm to the State, its taxpayers, and its businesses facing the competitive disadvantage of tax avoidance by a Yakama business.

B. The Washington Supreme Court Decision Conflicts with this Court's Holdings on Construing Indian Treaties and Preemption of State Laws

The Washington Supreme Court ruling also warrants review because it conflicts with this Court's case law. First, it defies this Court's fundamental rule that state taxes and regulations apply to Indians outside reservation boundaries absent an express federal law providing for preemption. Second, it contradicts this Court's long-standing rules for interpreting Indian Treaties because the state court relied on subjective inferences about historical understanding to supply a right that does not exist in the treaty language itself.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148-49; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("Unless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." (internal quotation marks omitted) (citing *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005))).

This principle applies with special force to tax laws. Tribes and their members are subject to generally applicable off-reservation taxes "[a]bsent a 'definitely expressed' exemption." *Mescalero*, 411 U.S. at 156 (quoting *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)). "[T]ax exemptions are not granted by

implication." *Mescalero*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). They must be "clearly expressed." *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved")). This rule is not merely a tool of interpretation; it is a critical "bright-line standard" "to ensure efficient tax administration" by the states. *Wagnon*, 546 U.S. at 113.

The Washington Supreme Court cited this rule in passing, but gave it no effect. App. 4a-5a (citing *Mescalero*, 411 U.S. at 148). The majority noted that "[a] treaty constitutes an express federal law," App. 4a, but that truism ignores that the relevant question is what the treaty Congress ratified actually says. And the majority never explained how the Yakamas' "right, in common with citizens of the United States, to travel upon all public highways," could possibly create an "express exemption" from a wholesale fuel tax that even the majority acknowledged "is assessed regardless of whether Cougar Den uses the highway." App. 13a-14a. The conflict with this Court's "express exemption" requirement is palpable.

The Washington court also departed from this Court's case law by relying upon the claimed historical understanding of the Yakama in order to read into the treaty a right to avoid taxation that does not exist anywhere in the treaty language itself. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) ("liberal construction cannot [overcome] a clear geographic limit in the Treaty"). Only if language is ambiguous will this

Court seek to construe it "in accordance with the tenor of the treaty," while "stop[ping] short of varying its terms to meet alleged injustices." *Northwest Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945).

The Ninth Circuit has correctly held that this treaty unambiguously includes no right to engage in tax-free trade. *King Mountain*, 768 F.3d at 998. But the Washington Supreme Court layered inference on top of implication in finding such a right "[b]ased on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes." App. 16a. This is precisely the type of rewriting of a treaty based on inferred understandings this Court uniformly rejects. This rewriting based on alleged historical understanding is particularly troubling given that for at least 125 years after the treaty was signed, neither party to the treaty interpreted it the way the Washington Supreme Court now has. Prior to 1980, neither the Yakama Tribe nor any of its members had claimed a right to transport goods via public highways free of state taxation. *Yakima Indian Nation v. Flores*, 955 F. Supp. 1229, 1254-55 (E.D. Wash. 1997). And the United States still rejects such an understanding. When it opposed certiorari in *Ramsey v. United States*, No. 02-1547 (denied Oct. 6, 2003), the government rebutted Yakama arguments that a right to engage in tax-free interstate trade

could be found anywhere in the treaty, disclaiming a historical understanding of tax-free highway trading.[7]

The bottom line is that the Washington court found a tax exemption based not on any express exemption, but on inferences about alleged understandings that bear no relation to the treaty's text. Based on the tribe's "right, in common with citizens of the United States, to travel upon all public highways," the court found an exemption from wholesale fuel taxes even when no Yakama member had traveled on a public highway to transport the fuel and even though the tax applies regardless of whether the fuel is transported by highway. This is not an "express exemption," and no textual ambiguity justifies this untenable reading. The Court should grant the petition to address these conflicts with its precedent.

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[7] In *Ramsey*, the United States Brief in Opposition pointed out that the Yakama argument claiming avoidance of taxation was contrary to the "settled principle" "that exemptions from taxation are not to be implied; they must be unambiguously proved" even in the context of an Indian treaty. BIO at 7 (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)) (citing *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939) ("Exemptions from taxation do not rest upon implication.")). It pointed out that *Mescalero* applied to the treaty, because there was no language to create any right to avoid diesel taxes. BIO at 7. "The treaty does *not* refer to taxation at all." BIO at 8 (emphasis in original). "In providing the Yakama a right 'in common with citizens of the United States,' the treaty *expressly* gives the Yakama a right equal to, not superior to, the right of other citizens to travel on public highways." BIO at 9 (emphasis in original). As noted above, these observations apply equally to this case.

C. The Question Presented Is Important Because It Concerns the Critical State Power of Taxation

This Court has long recognized the critical importance of state taxing powers. "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). The enormous tax consequences of this case call out for this Court's immediate review. The $3.6 million in state revenues directly at issue in this case covers only taxes incurred during a seven month period in 2013. But the outcome of this case will control tens of millions in additional taxes that have been assessed against Cougar Den for later tax periods, in addition to taxes payable by similarly situated Yakama businesses. The harm to Washington taxpayers from this ruling will easily top hundreds of millions in the near future.

This issue matters beyond Washington because Cougar Den has demonstrated its intent to engage in fuel tax avoidance in other states. Cougar Den has obtained or is seeking fuel exporter licenses in Idaho (license number 004673649), Nevada (license number MCEX00046868), and Washington (application pending). Such licenses will permit it to obtain untaxed fuel for transport to lucrative markets in other states, where it will undoubtedly refuse to pay the tax imposed by the state where its fuel is

wholesaled. This includes markets such as southern California, where on-reservation retailers have already taken advantage of Yakama-supplied tax-free fuel. App. 28a-29a. In a short time, this state court ruling will allow a Yakama member to evade this Court's holding in *Wagnon*, with the potential to harm every state with wholesale fuel taxes like the Kansas tax upheld there. Without prompt review, states will lose critical revenues during disputes or relitigate the same legal question in other forums, wasting State and judicial resources.

Moreover, fuel taxes are not the only taxes likely affected by the ruling below. The Washington court held that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." App. 16a. Thus, any good that the Yakamas transport (or contract to have transported, as here) is now potentially exempt from state taxation, at least if the tax is litigated in state court. This Court has recognized that "tax administration requires predictability." *Oklahoma Tax Comm'n*, 515 U.S. at 459-60. This ruling guarantees unpredictability.

This unpredictability will also extend beyond Washington, because Yakama businesses have already cited the Treaty to avoid taxes as to other (non-fuel) products in other states. *See, e.g.*, *New York v. King Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 391 (E.D.N.Y. 2013) (noting defendant's argument that Yakama Treaty forecloses New York's regulatory

authority over defendant Yakama cigarette maker). And the same treaty language is found in treaties with at least two tribes in other states. Treaty With the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty With the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

Given the hundreds of millions of dollars at stake for Washington, the uncertainty this ruling creates as to other taxes, and the threats to other States, this Court should promptly review the Washington Supreme Court's extraordinary holding.

D. This Case Provides a Perfect Vehicle to Determine if the Yakama Treaty Creates a Right to Avoid Taxes on Goods Shipped over Public Highways

There is no vehicle problem that would interfere with this Court's resolution of this case. The state court ruling is limited to one issue: the federal question regarding the meaning of the treaty. App. 4a. Because its decision is based on a summary judgment record and previously decided cases, the issues in this case are entirely questions of law. *See Houchins v. KQED, Inc.*, 429 U.S. 1341, 1342-43 (1977) (interpretation of prior judicial rulings presents a question of law). Moreover, this Court's ruling would entirely resolve this case: the state court agreed that, but for this alleged treaty right, the tax indisputably applies. App. 5a. The Court would thus be able to decide cleanly the important question whether the treaty language creates an exemption from off-

reservation taxes for Yakama-owned businesses using the public highways.

CONCLUSION

The Washington Supreme Court's decision creates a clear conflict with decisions of the Ninth Circuit and this Court, will have enormous financial implications for Washington and other States, and offers a perfect opportunity to address the question presented. The Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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June 14, 2017

APPENDIX

FILE
IN CLERKS OFFICE
SUPREME COURT, STATE OF
WASHINGTON
MAR 16 2017
s/ Fairhurst, J.
CHIEF JUSTICE

This opinion was filed for record
at 8:00 am on March 16, 2017
s/ Susan L. Carlson
SUSAN L. CARLSON
SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COUGAR DEN, INC., a Yakama Nation corporation, Respondent, v. WASHINGTON STATE DEPARTMENT OF LICENSING, Appellant.	No. 92289-6 En Banc Filed MAR 16 2017

JOHNSON, J.—Article III of the Yakama Nation Treaty of 1855 provides in pertinent part:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, 12 Stat. 951, 952-53 (1855).

The issue in this case centers on the interpretation of the "right to travel" provision in the treaty, in the context of importing fuel into Washington State. The Washington State

Department of Licensing (Department) challenges Cougar Den Inc.'s importation of fuel without holding an importer's license and without paying state fuel taxes under former chapter 82.36 RCW, *repealed by* Laws of 2013, ch. 225, § 501, and former chapter 82.38 RCW (2007).

An administrative law judge (ALJ) ruled in favor of Cougar Den, holding that the right to travel on highways should be interpreted to preempt the tax. The Department's director, Pat Kohler, reversed. On appeal, the Yakima County Superior Court reversed the director's order and ruled in favor of Cougar Den. We affirm.

FACTS AND PROCEDURAL HISTORY

Cougar Den is a Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) corporation that transports fuel from Oregon to the Yakama Indian Reservation, where it is sold. Kip Ramsey, Cougar Den's owner and president, is an enrolled member of the Yakama Nation.

Cougar Den began transporting fuel in 2013 from Oregon to the Yakama Indian Reservation. Cougar Den contracted with KAG West, a trucking company, to transport the fuel into Washington from March 2013 to October 2013.

On December 9, 2013, the Department issued assessment number 756M against Cougar Den, demanding $3.6 million in unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines. Cougar Den appealed the assessment to the Department's ALJ, who held in his initial order that the assessment was an impermissible restriction

under the treaty. The Department sought review of the ALJ's initial order. Upon review, the director of the Department reversed the ALJ and entered findings of fact and conclusions of law.

The director held that the Yakama treaty did not preempt the taxes, license requirements, and penalties sought against Cougar Den. Cougar Den then petitioned for review of the final order by the Department. The Yakima County Superior Court, sitting in an appellate capacity, reversed the director's order and held that the taxation violated the tribe's right to travel. The Department appealed the superior court's decision and sought direct review under RAP 4.2(a)(2). We granted direct review.

ANALYSIS

This case began as a challenge to an administrative order; therefore, review is governed by chapter 34.05 RCW. Under that statute, in relevant part, we review to determine whether the decision is an erroneous interpretation or application of the law.[1] Generally, an "'agency decision is presumed correct and the challenger bears the burden of proof.'" *King County Pub. Hosp. Dist. No. 2 v. Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013) (quoting *Providence Hosp. of Everett v. Dep't of Soc. & Health Servs.*, 112 Wn.2d 353, 355, 770 P.2d 1040 (1989)).

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[1] "Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

" . . . .

"(d) The agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

However, this case involves a treaty interpretation, which is a legal question reviewed de novo. *Chi. Title Ins. Co.* v. *Office of Ins. Comm'r,* 178 Wn.2d 120, 133, 309 P.3d 372 (2013) ("The agency's interpretation of pure questions of law is not accorded deference." (citing *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 292, 2 P.3d 1022 (2000))). This court sits in the same position as the superior court, reviewing the standards of the Washington Administrative Procedure Act, chapter 34.05 RCW, directly to the record established before the agency.

Washington State law imposes a tax on fuels used for the propulsion of motor vehicles on the highways of the state. In 2013, when Cougar Den transported fuel into the state, chapter 82.36 RCW governed taxes on motor vehicle fuel, or gasoline, and former chapter 82.38 RCW governed taxes on "special fuel," which includes diesel fuel.[2] Fuel taxes are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state. Former RCW 82.36.020(2) (2007); former RCW 82.38.030(7) (2007).

The Yakama Indian Reservation is a federally recognized Indian tribal reservation located within the state of Washington. Outside an Indian reservation, Indian citizens are subject to state tax laws, "[a]bsent express federal law to the contrary." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). A treaty constitutes an express federal law. There is no dispute that the taxes and licensing requirements would

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[2] In 2013, Governor Jay Inslee signed House Bill 1883, which repealed chapter 82.36 RCW and combined it with chapter 82.38 RCW. H.B. 1883, 63d Leg., Reg. Sess. (Wash. 2013).

apply if the treaty provision does not apply here. However, Cougar Den asserts that the right to travel provision in the treaty precludes the State from demanding unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines (relying on treaty language that "the right of way . . . is secured to them . . . to travel upon all public highways").

The United States Supreme Court has established a rule of treaty interpretation: Indian treaties must be interpreted as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31, 90 S. Ct. 1328, 25 L. Ed. 2d 615 (1970).

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-85, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

The Ninth Circuit has recognized this rule of treaty construction. *See United States v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007); *Cree v. Flores*, 157

F.3d 762, 769 (9th Cir. 1998) (*Cree* II). Treaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor.

The Department argues that Cougar Den's reading of the right to travel provision is overly broad. It asserts that the Ninth Circuit cases involving the right to travel forbid the State from specifically restricting the right to travel on a highway, but allow the State to restrict or regulate a specific good that is incidentally brought over a highway. The Department argues that the treaty does not preempt Washington State fuel taxes in this case. Both parties here support their arguments by citing several Ninth Circuit cases.

The Department's interpretation of the treaty provision ignores the historical significance of travel to the Yakama Indians and the rule of treaty interpretation established by the United States Supreme Court. In ruling in Cougar Den's favor, both the ALJ and the Yakima County Superior Court based their decisions on the history of the right to travel provision of the treaty, relying on the findings of fact and conclusions of law from *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997).

The factual record regarding the treaty interpretation of the historical meaning of the right to travel relied on below was developed in a federal action, *Cree* II.[3] Because the rule of treaty

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[3] This *Cree* case began in the federal district court as *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994), appealed to the Ninth Circuit, then remanded for factual development in *Yakama Indian Nation*. *Cree v. Waterbury (Cree* I), 78 F.3d 1400 (9th Cir. 1996). In *Yakama Indian Nation*, the court undertook "a 'factual investigation into the historical context and parties'

interpretation requires that treaties be read as the Indians would have understood them, the district court conducted an extensive factual inquiry regarding the treaty and the historical context of the right to travel provision. The court determined that the treaty and the right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes. The court found that the record unquestionably depicted a tribal culture whose manner of existence was dependent on the Yakamas' ability to travel. *Yakama Indian Nation*, 955 F. Supp. at 1239.

At the time the treaty was drafted, agents of the United States knew of the Yakamas' reliance on travel. During negotiations, the Yakamas' right to travel off reservation had been repeatedly broached, and assurances were made that entering into the treaty would not infringe on or hinder their tribal practices. Promises were made to protect the Indians

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intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right,'" and "'examine[d] the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right."' *Yakama Indian Nation*, 955 F. Supp. at 1234, 1235 (quoting *Cree* I, 78 F.3d at 1403, 1405). After completing extensive investigation, it entered findings of fact and conclusions of law.

from "'bad white men"' if the tribes agreed to live within designated reservations. *Yakama Indian Nation*, 955 F. Supp. at 1243. Agents of the United States thus repeatedly emphasized in negotiations that tribal members would retain the "'same liberties . . . *to go on the roads to market.*"' *Yakama Indian Nation*, 955 F. Supp. at 1244. The court further determined that "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached." *Yakama Indian Nation*, 955 F. Supp. at 1251. The treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. There was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Finally, the court found that "the Treaty was clearly intended to reserve to the Yakamas' right to travel on the public highways to engage in *future* trading endeavors." *Yakama Indian Nation*, 955 F. Supp. at 1253.

In reliance on these vital promises, the Yakamas forever ceded 90 percent of their land in exchange for these rights. Yakama Nation thus understandably assigned a special significance to each part of the treaty at the time of the signing and continues to view the treaty as a sacred document today. It is important to note that although the United States negotiated with many Northwest tribes, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one. *Cree* II, 157 F.3d at 772.

With the historical importance of the right to travel in mind, on review, the Ninth Circuit adopted the findings and treaty interpretation from the district court and held that the treaty exempted the Yakama Indians from various Washington truck license and overweight permit fees. In that case, the plaintiff, Yakama Indian Nation, sold timber and hauled logs from within reservation lands to off-reservation mills. Defendants were state officers authorized to issue traffic citations for violations of state vehicle registration, licensing, and permitting statutes. Plaintiff brought suit after the officers issued citations for violation of these statutes. In determining whether the treaty exempted Yakama Indian Nation from the fees, the court considered the historical context of the treaty and recognized the significance of travel to the Yakamas. The court agreed with the district court's finding that the treaty secured for the Yakamas' the right to use future roads and to *trade* their goods. The court held that the treaty exempted the tribe from truck license and permitting fees. *Cree* II, 157 F.3d at 774.

Nine years later, the Ninth Circuit considered the right to travel in another context in *Smiskin*. In that case, agents of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives suspected the Smiskins, members of Yakama Nation, of transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. In June 2004, the agents seized 4,205 cartons of unstamped cigarettes from the Smiskins' residence and charged them with violating the federal contraband cigarette trafficking act (CCTA),

18 U.S.C. § 2342(a). Under the CCTA, it is "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes." 18 U.S.C. § 2342(a). "'[C]ontraband cigarettes' means a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found." 18 U.S.C. § 2341(2).

Washington State requires wholesalers to affix either a "tax paid" or "tax exempt" stamp to cigarette packaging prior to sale. *See* RCW 82.24.030. Individuals other than licensed wholesalers may transport unstamped cigarettes only if they have "given notice to the [Washington State Liquor Control Board] in advance of the commencement of transportation." RCW 82.24.250(1). The Smiskins did not provide notice to the State prior to transporting unstamped cigarettes; therefore, the cigarettes were unauthorized under state law. As a result, the Smiskins' possession and transportation of the contraband cigarettes was alleged to violate the terms of the CCTA.

Again, to determine whether the treaty precluded the State from prosecuting the Smiskins' violation of the State's prenotification requirement, the Ninth Circuit looked to the right to travel provision of the treaty. The court held that the Smiskins were not required to notify anyone prior to transporting goods to market because the treaty "'expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached.*'" *Smiskin*, 487 F.3d at 1266 (quoting *Yakama Indian Nation*, 955 F. Supp. at

1251). It held that applying a prenotification requirement was a condition on travel that violated the Yakamas' treaty right to transport goods to market without restriction.

The court noted the "tremendous importance" of the right to travel provision and "refuse[d] to draw what would amount to an arbitrary line between travel and trade." *Smiskin*, 487 F.3d at 1265-66. "[W]hether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree* II and render the Right to Travel provision truly impotent." *Smiskin*, 487 F.3d at 1266-67 (footnote omitted).

Of importance in the decision is the court's discussion of the regulatory exception. In resolving conflicts between state laws and Indian treaties, the United States Supreme Court has stated that pure regulatory restrictions may be validly applied to tribal members. The State in *Smiskin* argued that the State's tax collection effects had a regulatory purpose. However, the court found that Washington's stated purpose for requiring cigarette stamps, and hence for requiring notice before unstamped cigarettes are transported within the State, was to "'enforce collection of the tax hereby levied.'" *Smiskin*, 487 F.3d at 1269 (quoting RCW 82.24.030(1)). The court rejected the State's arguments and held that the treaty protected the activity.

More recently, in 2014, the Ninth Circuit addressed the right to travel provision again. The

Department relies on *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), to assert that the trial court interpreted the right to travel provision too broadly. In *King Mountain*, the plaintiff was a private tobacco company owned by Delbert Wheeler, an enrolled member of the Yakama Nation. King Mountain sought relief from application of Washington's escrow statute, which required King Mountain to place money into escrow to reimburse the State for health care costs related to the use of tobacco products. The court analyzed the treaty again and held that the plain text reserved to the Yakamas the right "'to travel upon all public highways,'" not the "right to trade." *King Mountain*, 768 F.3d 997, 998 (quoting 12 Stat. 953). The court distinguished *King Mountain* from the *Cree* cases by noting that the *Cree* cases involved "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market." *King Mountain*, 768 F.3d 998. The court affirmed judgment in favor of the State and rejected King Mountain's reliance on the treaty right to travel.

The Department argues that this case is analogous to *King Mountain* because both companies "claim[] a right to engage in *trade* in addition to or above and beyond a right to travel upon the highways." Appellant's Opening Br. at 27. The Department asserts that Cougar Den is not facing a tax for "'using public highways. . . . [Rather, it] is being taxed for importing fuel.'" Appellant's Opening Br. at 27 (quoting Clerk's Papers at 1008). The Department argues that Cougar Den relies "heavily on dicta" in *Smiskin*. Appellant's Opening Br. at 29. The Department

argues that in *Smiskin*, the State restricted the right to travel on the highway, whereas here, the State is regulating fuel. The Department argues, and the Director agreed, that the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways. It distinguishes *Smiskin* by asserting that Cougar Den does not need a fuel importer license in order to use public highways. "Rather, Cougar Den needs a fuel importer license to engage in business as a fuel trader." Appellant's Opening Br. at 30. The "tax applies without regard to travel on a highway," and "Cougar Den happens to hire trucks," but "[t]he tax is not a condition or restriction on Cougar Den's use of highways." Appellant's Opening Br. at 30, 31. It argues that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway.

The Department's argument is unpersuasive. *Smiskin* is nearly identical to this case. In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction. The difference between *Smiskin* and *King Mountain* is that in *King Mountain*, travel was not at issue. In *King Mountain*, the court held under the facts that "there is no right to trade in the Yakama Treaty." *King Mountain*, 768 F.3d at 998. Where trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated. Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the

highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.

In addition, the tax does not, as the State argues, fall under the regulatory exception. In *Smiskin,* the purpose of the notice requirement was the collection of taxes on the transported goods. The prenotification requirement was triggered by the transportation of cigarettes into the state. Likewise, here, the Department requires that companies obtain a license prior to hauling goods into the state: the purpose of the licensing requirement is to collect taxes. We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce.

Finally, the Department argues that applying the Ninth Circuit's reasoning would lead to "unimagined and unintended preemption of fundamental state powers." Appellant's Opening Br. at 32. The Department noted that the superior court's reasoning "could allow Yakama tribal members to avoid state laws that regulate goods by simply contriving to possess the goods on public highways." Appellant's Opening Br. at 33. An example the Department gave was that Yakama tribal members could avoid the law barring a felon from possessing a firearm simply because by traveling on a public highway, the treaty preempts state law. This same argument was made by the Defendants in *Smiskin*: if affirmed, the court's ruling would "preclude the State of Washington and the federal government from regulating tribal transportation of other 'restricted goods,' such as illegal narcotics and 'forbidden fruits [and] vegetables.'" *Smiskin*, 487 F.3d

at 1270-71 (alteration in original). The Ninth Circuit rejected this argument, observing that the concern was "unfounded, if not disingenuous." *Smiskin,* 487 F.3d at 1271. Laws with a purely regulatory purpose can be validly applied. In addition, the Ninth Circuit quoted the Yakama Nation and its amicus brief:

> "The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order. The Yakama Nation does not and never has asserted that its members have a right under its treaty to traffic in narcotics. For the government of the United States to be suggesting otherwise is irresponsible.
>
> "The Yakama Nation must and will intercede as litigant or *amicus* to protect its members' treaty right to travel when the federal government overreaches, as it has here. But the Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. The Nation has no such interest not only because irresponsible overreaching on its part would likely prompt Congress to exercise its constitutional/ political power to abrogate or limit the treaty right to travel, but also because the Yakama Nation and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure."

Smiskin, 487 F.3d at 1271. We agree.

We also note that this case does not present the "parade of horribles" concern raised by the State. In interpreting the treaty, we are bound to read the provisions as the Tribe understood them. As noted, the right to travel provision appears to be unique to the Yakama and Nez Perce tribes. If the State has concerns about this treaty provision, only Congress can revise or restrict the provisions, not this court.

As determined by the federal courts, any trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty. The Department taxes the importation of fuel, which is the transportation of fuel. Here, it was simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways. Based on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes, this right is protected by the treaty.[4]

We affirm.

s/ Johnson, J.

WE CONCUR:

s/ Owens, J.

s/ González, J.

s/ Madsen, J.

s/ McLeod, J.

s/ Stephens, J.

s/ Yu, J.

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[4] Cougar Den also asserts that the director of the Department violated the appearance of unfairness doctrine. The Department counters by arguing that Cougar Den failed to raise the issue; therefore, the appellate court cannot entertain disqualification claims. This claim does not need to be addressed because the merits of the claim are reviewed de novo by this court. And, under either result here, the director will have no future role.

A. No. 92289-6

FAIRHURST, C.J. (dissenting)—Washington' s fuel excise tax burdens trade—the first instance of *wholesale possession* of fuel within Washington—not fuel transport. The Confederated Tribes and Bands of the Yakama Nation's (Yakama Nation) "right . . . to travel," as described in article III of their treaty, *Treaty with the Yakamas*, 12 Stat. 951, 953 (1855) (treaty right to travel), is not a right to trade. The majority's holding, if taken to its logical conclusion, would create a hole, bigger than that required to drive a tanker truck, in Washington's ability to tax goods consumed within the state, without legal basis. Therefore, I respectfully dissent.

I. ANALYSIS

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribes v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 1114 (1973). This includes state fuel excise taxes. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 97, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005) The majority holds that the treaty right to travel preempts Washington's motor vehicle fuel excise tax, former chapter 82.36 RCW (2007), *repealed by* Laws of 2013, ch. 225, § 501, and special fuel excise tax, former chapter 82.38 RCW (2007), *amended by* Laws of 2013, ch. 225, § 501.[1] As a result, it finds Cougar Den Inc.'s

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[1] The distinction between motor vehicle fuel and special fuel, which includes diesel fuel, was removed effective July 1, 2015. The statute was simplified and recodified into chapter 82.38 RCW. Laws of 2013, ch. 225, § 501. Previously, taxes were

off-reservation fuel importation activities exempt from Washington's fuel excise tax regime. I disagree and, therefore, respectfully dissent.

A. Former chapters 82.36 and 82.38 RCW represent a tax on the *wholesale possession*, not transportation, of fuel

The majority reaches its holding after finding that Washington's fuel excise tax regime "taxes the importation of fuel, which is the transportation of fuel." Majority at 16. But "import," as used here, is a term of art not requiring transportation of any kind. Former RCW 82.36.010(10); former RCW 82.38.020(12). "Import" is defined as "bring[ing] . . . fuel into this state," other than through a "pipeline or vessel" operated by a "licensee" and bound for a "terminal" or "refinery," unless located in "the fuel supply tank of a motor vehicle." Former RCW 82.36.010(3), (4), (10), .020(2)(c); former RCW 82.38.020(4), (5), (12), .030(7)(c). Further, the tax is levied "at the time and place of the first taxable event and upon the first taxable person within this state." Former RCW 82.36.022; former RCW 82.38.031. The statutory language alone demonstrates the clear intent of the legislature—to levy an excise tax on the first instance of *wholesale possession* of fuel not distributed through a refinery or importation terminal within the state. Whether

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separately imposed on motor vehicle fuel, special fuel, and aviation fuel pursuant to separate RCW chapters. S.B. Rep. On Substitute H.B. 1883, at 2, 63d Leg., Reg. Sess. (Wash. 2013). All references to chapters 82.36 and 82.38 RCW in this opinion are to the RCW in effect at the time of the Department of Licensing's tax assessments against Cougar Den—2013.

that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due. The history of Washington's fuel tax regime only further reinforces this conclusion.

Washington first levied an excise tax on motor vehicle fuel in 1921. *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 845, 357 P.3d 615 (2015) (citing Laws of 1921, ch. 173, § 2). Until 1999, retailers were primarily responsible for paying the tax. *Id.* at 847. To improve compliance and reduce administrative costs, Washington shifted the reporting and collection burden to the suppliers at the top of the fuel supply chain in 1999. S.B. Rep. on Substitute H.B. 2659, at 1-2, 55th Leg., Reg. Sess. (Wash. 1998).[2]

Refiners and terminal operators were now charged with collecting, reporting, and remitting excise tax when fuel was removed "from a terminal . . . at the rack," Laws of 1998, ch. 176, § 7(2)(a) (formatting omitted), or "from a refinery" by "bulk transfer" or "refinery rack," *id.* § 7(2)(b)(i), (ii) (formatting omitted). "'Rack'" is defined as a "mechanism for delivering . . . fuel from a refinery or terminal."[3] *Id.* §§ 6(23), 50(20) (formatting omitted). But distributors, and ultimately retailers, remained

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[2] At the time, there were 740 licensed fuel distributors and 27,000 individuals licensed to purchase fuel without paying tax at the time of purchase. S.B. Rep. on Substitute H.B. 2659, at 1.

[3] There were 24 terminal racks within Washington when the statute was last modified in 2013. S.B. Rep. on Substitute H.B. 1883, at 1, 63d Leg., Reg. Sess. (Wash. 2013).

burdened with paying the tax. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1261 (W.D. Wash. 2005). They were required to reimburse refiners and terminal operators for tax those suppliers prepaid on their behalf.[4] Laws of 1998, ch. 176, § 12(5). Fuel transport within Washington was not mentioned in the revised scheme, except for certain basic reporting obligations and routine inspections for those transporting fuel. *See id.* §§ 32, 33, 66, 80. For refined fuel bypassing the rack system via direct importation, the fuel importer would be liable for the tax on any fuel that it imports for purposes of "sale, consumption, use, or storage." *Id.* §§ 6(11), 7(2)(c), 50(12), 51(2)(c) (formatting omitted). Cougar Den's tax assessments arose under a version of this provision, as revised in 2007.

In 2007, the legislature revised the statute to address the opportunity *Squaxin Island Tribe*, 400 F. Supp. 2d at 1250, gave tribal retailers operating on Indian lands to avoid the imposition of Washington's fuel excise tax for their fuel sales to both tribal and nontribal members.[5] S.B. Rep. on S.B. 5272, at 1-2,

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[4] Further, refiners and terminal operators were entitled to refunds from the State for any prepaid tax they could not collect on fuel sold to distributors and retailers. Laws of 1998, ch. 176, § 15.

[5] The court held that despite suppliers' collection and reporting obligations under the 1999 statute, the legal incidence of the fuel excise tax regime continued to fall on retailers, rather than suppliers, distributors, or consumers. *Squaxin Island Tribe*, 400 F. Supp. 2d at 1261. To the extent those retailers were tribes or tribal members operating on Indian lands, they were exempt from Washington's fuel excise tax. *Id.* In *Squaxin*, the court applied *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458-59, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995), which

60th Leg., Reg. Sess. (Wash. 2007). Under the revised 2007 regime, those at the top of the supply chain-refiners and terminal operators—would now be solely responsible for the payment of tax when fuel is removed from their rack.[6] *Id.*; Laws of 2007, ch. 515, §§ 2, 6, 9, 18, 21. They would no longer prepay tax on behalf of the distributors and retailers they sold to. *Id.* §§ 4, 23.[7] Should there be any question, the legislature also added the following language: "It is the intent and purpose . . . that the tax shall be imposed *at the time and place of the first taxable event* and upon the first taxable person within this state." *Id.* at §§ 20, 33 (emphasis added); former RCW 82.36.022; former RCW 82.38.031. These changes reinforce the notion that possession, not distribution, is the intended activity subject to tax.

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established a legal incidence test, to determine whether Washington's fuel tax regime ran afoul of tribal sovereignty. *Id.* Under this test, who ultimately pays the tax does not control. "Although consumers in Washington State will nearly always find the tax imbedded in the price of fuel, the Supreme Court explicitly cautioned against using 'economic reality' as a basis for answering the legal incidence question." *Id.* (citing *Chickasaw*, 515 U.S. at 459-60). Instead, the language of the statute controls. *Id.* If this language places the legal incidence of the state tax on a sovereign party, that tax cannot be levied. *Id.*

[6] In response, some tribes threatened to establish their own refineries or terminals on Indian land in order to avoid the imposition of tax based on sovereign authority. *Auto. United Trades*, 183 Wn.2d at 848. Instead, most—excluding the Yakama Nation—entered into tax sharing arrangements in which the tribe receives a refund of tax paid by suppliers on fuel purchased by tribal members on their reservations. *Id.* at 850-51.

[7] Further, the suppliers' statutory mechanism to recover prepaid tax was removed. Laws of 2007, ch. 515, §§ 4, 23.

The legislature made another change in 2007 that reinforces this notion. From 1999 through 2007, tax applied to imported motor vehicle fuel only when that fuel was imported for purposes of "sale, consumption, use, or storage" within Washington. Laws of 1998, ch. 176, § 7(2)(c) (formatting omitted). Beginning in 2007, *all* imported motor vehicle fuel would be subject to tax, regardless of the purpose for which it was imported.[8] Laws of 2007, ch. 515, § 2(2)(c); former RCW 82.36.020(2)(c). This language was operative at the time of the Department of Licensing's (DOL) assessments against Cougar Den. *See* Clerk's Papers (CP) at 66-68, 81-82 (December 2013 and February 2014 DOL tax assessments against Cougar Den).

This history further demonstrates the legislature's intent—to impose tax at the highest level possible in the supply chain. For importation activities, this would be the first instance of *wholesale possession* of fuel within Washington. I fail to see how such a scheme directly implicates travel.

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[8] A similar "sale, consumption, use, or storage" condition was included in Washington's special fuel excise tax statute prior to the 2007 change. LAWS OF 1998, ch. 176, § 51(2)(c) (formatting omitted). In what may have been a scrivener's error, the language was retained for special fuel while removed for motor vehicle fuel. Laws of 2007, ch. 515, § 21(7)(c); former RCW 82.38.030(7)(c). When the statutes were later consolidated into chapter 82.38 RCW, effective July 1, 2015, this conditional language remained. Laws of 2013, ch. 225, § 103(7)(c). It is not clear whether keeping this conditional language was intended, as it had previously been removed in 2007 for imported motor vehicle fuel.

B. The Yakama Nation's treaty right to travel applies to trade *only* when it cannot be meaningfully separated from travel, not when travel is merely necessary for trade

Both *Smiskin* and *King Mountain* provide that a treaty right to travel applies to trade *only* when Washington law imposes a limitation on travel and trade, *and* the two cannot be meaningfully separated. *United States v. Smiskin*, 487 F.3d 1260, 1266 (9th Cir. 2007); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014). Such is not the case with Washington's fuel excise tax. The majority fails to see this distinction and, instead, concludes that Cougar Den's trading activity is exempt from Washington's fuel excise tax merely because travel is necessary for trade. But neither *Smiskin* nor *King Mountain* held this to be a relevant consideration.

At issue in *Smiskin* was the application of the contraband cigarette trafficking act (CCTA), 18 U.S.C. § 2342(a), to a Yakama Nation member. 487 F.3d at 1263. The CCTA imposes criminal penalties for dealing in contraband cigarettes. *Id.* "Contraband cigarettes," in turn, are defined by state law. Washington law provides that cigarettes not containing tax stamps that are transported by wholesalers who fail to first notify Washington's Liquor Control Board of their intent to transport are contraband. *Id.*; RCW 82.24.250(1). Transport, *not possession*, was the predicate for the prosecution at issue in *Smiskin*.[9]

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[9] In *United States v. Fiander*, another Yakama Nation member successfully defended a CCTA charge based on his treaty right to travel. 547 F.3d 1036 (9th Cir. 2008). While the

In ruling for Smiskin, the United States Court of Appeals for the Ninth Circuit held that his treaty right to travel preempted Washington's transportation notice requirement because the right includes the right to "'transport goods to *market*' for '*trade* and other purposes'" and the notice requirement burdened such transport. *Smiskin*, 487 F.3d at 1266 (quoting *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998)). The court noted that when "the right to travel overlaps with the right to trade . . . such that excluding commercial exchanges . . . would effectively abrogate our [prior decisions] and render the Right to Travel provision truly impotent," it should not "draw what would amount to an arbitrary line between travel and trade." *Id.* at 1266-67. But *Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true. 768 F.3d at 989. Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted by the Yakama Nation's treaty right to travel. *Id.* at 997-98. *Smiskin* simply stands for the proposition that when travel and trade cannot be meaningfully separated within a state

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CCTA defense was upheld, the court held the defendant could still be prosecuted for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d), for his activities. *Id.* at 1039-42.

scheme, a Yakama Nation member's treaty right to travel preempts both aspects of that scheme.

The state obligation in *King Mountain* arose from a Washington statute requiring tobacco product manufacturers to place into escrow funds to reimburse Washington for health care costs associated with the tobacco products they sold to Washington consumers. *Id.* at 991-92; RCW 70.157.020. King Mountain asserted that the Yakama Nation's treaty right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade,'" which includes bringing goods to market. *King Mountain*, 768 F.3d at 997. But the Ninth Circuit held otherwise, limiting the scope of the treaty right to travel to "'guarantee[ing] the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" *Id.* (quoting *Cree*, 157 F.3d at 769). It is not a "right to trade." *Id.*

Cougar Den and amicus make similar arguments as King Mountain attempted to make—the treaty applies equally to trade and travel. Resp't's Br. at 24-26; Amicus Curiae Br. of Yakama Nation at 12-13; *see King Mountain*, 768 F.3d at 992 (King Mountain asserts treaty right applies to "state economic regulation"). But this is not so. The treaty right applies to trade only if inextricably linked to travel. Otherwise, the argument fails. *Smiskin*, 487 F.3d at 1266. As a result, it should fail here, as it failed in *King Mountain*, 768 F.3d at 997-98.

The escrow payment in *King Mountain* had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought to bring to market in Washington.[10] *Id.* at 991; *see* RCW 70.157.020 (requiring an escrow payment by tobacco manufacturers for products sold to "consumers within the State"). Similarly, Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington. Former RCW 82.36.020(2)(c), .022; former RCW 82.38.030(7)(c), .031. In both instances, King Mountain's and Cougar Den's, travel is necessary for trade.

Without travel, most goods have no market. But as *King Mountain* demonstrates, necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption. 768 F.3d at 997-98. The necessity to bring its burdened goods to market did not entitle King Mountain to an exemption on its escrow obligation. Nor should Cougar Den be entitled to such an exemption.

Curiously, the majority claims, "*Smiskin* is nearly identical to this case." Majority at 13. I disagree. The specific provision Harry Smiskin was accused of violating required a wholesaler to "'give[] notice to the [Liquor Control Board] in advance of the commencement of *transportation*'" of unstamped cigarettes. *Smiskin*, 487 F.3d at 1263 (emphasis

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[10] King Mountain also distributed its products outside of Washington. *King Mountain*, 768 F.3d at 997-98.

added) (second alteration in original) (quoting RCW 82.24.250(1)). Transportation was at the very essence of the Washington law at issue in *Smiskin*. *See* RCW 82.24.250(1). Trade was peripheral. Washington's fuel excise tax, on the other hand, accrues "at the time and place of the first taxable event and upon the first taxable person within this state," i.e., *wholesale possession*, not subsequent transportation. Former RCW 82.36.022; former RCW 82.38.031. I fail to see the similarity between *Smiskin* and this case.

C. The implications of the majority's holding extend beyond this tax regime

The majority is too quick to dismiss the "'parade of horribles'" the State claims could arise from the majority's ruling. Majority at 16. True, felons will not avoid firearm possession charges as a result of this holding, even if they are Yakama Nation members traveling on public highways. Nor would Washington be precluded from regulating the transportation of restricted goods by tribal members. The regulatory exception covers such instances. *Smiskin*, 487 F.3d at 1271.

But what this ruling puts at risk is Washington's, and potentially other states', ability to tax goods consumed within its borders. A simple extension of the majority's logic would allow *nontribal members* to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members.[11] The

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[11] Both the Nez Perce and Yakama Nation tribes have similar treaty rights to travel. *Cree*, 157 F.3d at 772. The majority's

majority provides no clear limits. Transport is *necessary* to bring many goods to market. *See* Appellant's Opening Br. at 33 (discussing the potential impact on Washington's use tax regime from such a ruling). Does this mean all goods transported to market by Yakama Nation members, regardless of the identity of the buyer and the purpose of transport, are exempt from state tax? Nothing indicates any of the parties understood the Treaty of 1855 to provide for such a right. *See Cree*, 157 F.3d at 766-68 (describing the historical context of treaty negotiations). Yet the majority's ruling seems to create just such a right.

Ours is a case in point. Cougar Den delivers almost all of its fuel to retail gas stations in Washington. Those gas stations, in turn, sell not just to tribal members, but the general public.[12] Cougar Den seeks an exemption from Washington's fuel excise tax on *all* of the fuel it distributes. Indeed, another Yakama Nation member has made similar claims in California, with detrimental impacts not just to the state's ability to tax, but its competitive business environment. *See Salton Sea Venture, Inc. v. Ramsey*, No. 11CV1968-IEG, 2011 WL 4945072, at *7 (S.D. Cal. Oct. 18, 2011) (court order) (competitor asserts a Yakama Nation member's claimed exemption from the imposition of

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rnling could apply with equal force to transport activities by members of either tribe.

[12] Cougar Den asserts that it provides "fuel [only] to members of the Yakama Nation." Resp't's Br. at 4. But it fails to note that "more than 90 percent of the fuel it imported" during the period at issue was to tribal members who are "retail gas stations [permitted to] . . . sell to 'any person.'" CP at 1004.

California's fuel excise tax due based on the treaty right to travel was an unfair business advantage). The majority's ruling would, undoubtedly, provide a basis for further examples.

For the reasons stated above, I dissent. The Yakama Nation's treaty right to travel on public highways does not preclude taxation of Cougar Den's off-reservation fuel distribution activities pursuant to former chapters 82.36 and 82.38 RCW. I would reverse the superior court and affirm the ruling of DOL's director. Like the majority, I would not reach Cougar Den's appearance of unfairness argument because of the de novo review engaged in by this court.

s/ Fairhurst, C.J.

s/ Wiggins, J.

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SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

COUGAR DEN INC., a Yakama Nation corporation, Petitioner, v. DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON, Respondent.	Cause No.: 14-2-03851-7 [~~PROPOSED~~] FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court on July 10, 2015, on Petitioner Cougar Den Inc.'s Amended Petition for Judicial Review of Final Order of the Department of Licensing. The Court has reviewed the pleadings and files of record, including the following:

1. Certified Agency Record ("Agency Record") of OAH Docket NO. 2014-DOL-0006, Agency No. 756M;

2. Petition for Review of Final Order of Department of Licensing;

3. Petitioner's Motion for Leave to File Amended Petition;

4. Declaration of Harry Smiskin;

5. Respondent's Opposition to Petitioner's Motion for Leave to File Amended Petition;

6. Respondent's Motion to Strike Declaration of Harry Smiskin;

7. Petitioner's Response to Motion to Strike Declaration of Harry Smiskin;

8. Declaration of Andre M. Penalver in Response to Motion to Strike Declaration of Harry Smiskin;

9. Cougar Den's Reply in Support of Motion for Leave to File Amended Petition;

10. Declaration of Andre M. Penalver in Support of Reply for Leave to File Amended Petition;

11. Order Granting Leave to File Amended Petition and Denying Respondent's Motion to Strike Declaration of Harry Smiskin;

12. Amended Petition for Review of Final Order of Department of Licensing;

13. Cougar Den's Appeal Brief;

14. Respondent's Brief;

15. Cougar Den's Reply Brief in Support of Appeal;

16. Respondent's Citation of Supplemental Authority;

17. Cougar Den's Response to Respondent's Citation of Supplemental Authority.

On July 10, 2015, the Court heard oral argument from Andre Penalver, counsel for Cougar Den, Inc., and Fronda Woods, counsel for the Department of Licensing. Now, therefore, being fully advised, the Court hereby makes the following:

I. FINDINGS OF FACT

1. Pursuant to RCW 34.05.514 and RCW 34.05.542, Petitioner Cougar Den, Inc., timely filed a petition for judicial review of the Final Order of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M.

2. On January 30, 2015, this Court granted Petitioner's Motion for Leave to File Amended Petition and denied Respondent's Motion to Strike Declaration of Harry Smiskin.

3. Pat Kohler is the Director of the Washington Department of Licensing. During 2013, the State of Washington and the Yakama Nation were parties to a lawsuit in federal court concerning fuel taxes. As Director, Pat Kohler represented the Department of Licensing in mediation sessions with the Yakama Nation Tribal Council Chairman regarding the lawsuit. Decl. Harry Smiskin. The lawsuit was settled and dismissed in November 2013. Agency Record, pp. 549-50; Decl. Andre M. Penalver Supp. Reply for Leave to File Am. Pet. As part of the settlement, the Yakama Nation and the State of Washington executed a Fuel Tax Agreement. Agency Record, pp. 160-75; Decl. Harry Smiskin Attach. B. Pat Kohler signed the Fuel Tax Agreement on behalf of the Department of Licensing. Agency Record, p. 175; Decl. Harry Smiskin Attach. B p. 16.

4. Fuel Tax Assessment No. 756M expressly referenced the Fuel Tax Agreement. Agency Record, p. 151.

5. On July 24, 2014, upon Motions for Summary Judgment by both parties, an Administrative Law Judge issued an Initial Order in Cougar Den's favor in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006. Agency Record, pp. 847-60. The Initial order struck down all taxes, interest, penalities, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

6. On October 15, 2014, upon the Department's Petition for Review of Initial Order, Pat Kohler, Director of the Department of Licensing, issued a Final Order of Director in the Department's favor. Agency Record, pp. 935-46. The Final Order of Director reversed the Initial Order and reinstated the taxes, interest, penalties, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

7. The Court incorporates by reference the Findings of Fact in the Final Order of Director. Agency Record, pp. 938-40; *see* Agency Record, pp. 47-50 (Stipulation of Facts). No party has contended that they are not supported by substantial evidence. *See* RCW 34.05.570(3)(e).

8. In reference to Conclusions of Law 2 and 3, the Court incorporates by reference the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). Agency Record, pp. 251-58.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to RCW chapter 34.05, Part V. Venue is proper in the Yakima County Superior Court pursuant to RCW 34.05.514(1).

2. Article III of the Treaty codifies the Yakamas' right to travel upon all public highways ("the Right to Travel"). When travel is at issue, courts and adjudicators are required to examine the historical context of the Treaty to interpret the Right to Travel as the Yakamas of 1855 would have understood it, resolving any doubtful expressions in the Yakamas'

favor. The Director's failure to examine the historical context of the Right to Travel constitutes an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

3. To examine the historical context of the Treaty, the Director should have looked to the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (Agency Record, pp. 251-58). Such Findings are preclusive in this case.

4. Based on that historical context and pursuant to RCW 34.05.574, the Court determines that the Director's decision in this matter should be set aside because it erroneously interprets and applies the law for the reasons described in Attachment A, and that this is reversible legal error that the Court may address pursuant to RCW 34.05.570(3)(d).

5. Because Cougar Den's transport of fuel falls within its Right to Travel under the Treaty With the Yakamas, and because Assessment No. 756M places a restriction on the Right to Travel, Assessment No. 756M and its taxes, penalties, interest, and licensing requirements are preempted and barred by the Treaty. The Director's conclusion to the contrary is an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

6. Although not necessary to reach the Conclusions provided above, Assessment No. 756M expressly referenced the Fuel Tax Agreement, which arose from mediation sessions that Director Pat Kohler attended

as a party. It thus appears unfair that Ms. Kohler would review the Initial Order that struck down Assessment No. 756M. Her role in issuing the Final Order gives the Final Order an aura of partiality, impropriety, conflict of interest, or prejudgment, and thus violates Washington's Appearance of Fairness doctrine for the reasons described in Attachment A. Ms. Kohler was required to recuse herself and delegate the review of the Initial Order as permitted by RCW 34.05.425 and RCW 43.24.016(2). Because of her failure to do so, the agency engaged in unlawful procedure under RCW 34.05.570(3)(c). Pursuant to RCW 34.05.570(3)(g), Cougar Den has shown facts to support the grant of a motion for Ms. Kohler's disqualification.

7. The Court incorporates by reference its July 22, 2015 letter ruling on this matter, attached hereto as Attachment A.

8. The Final of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M, shall be set aside pursuant to RCW 34.05.570(3) and RCW 34.05.574(1).

WHEREFORE, the Court enters the following:

III. FINAL JUDGMENT AND ORDER

IT IS ORDERED that the Final Order of Directory is set aside, and that Cougar Den, Inc. is exempt from the taxes, penalties, interest, and licensing requirements at issue in the adjudicative proceeding on review.

DATED this 18th day of August, 2015.

s/ Judge Michael G. McCarthy
JUDGE MICHAEL G. McCARTHY

Presented by:
STOKES LAWRENCE VELIKANJE MORE & SHORE

By: *s/ Andre M. Penalver - 43073*
Brendan V. Monahan(WSBA #22315)
Andre M. Penalver (WSBA #43073)
Attorneys for Cougar Den Inc.

Approved as to form;
Notice of Presentment Waived

OFFICE OF THE ATTORNEY GENERAL

By: *s/ Fronda Woods*
Fronda C. Woods (WSBA #18728)
Attorneys for Department of Licensing

ATTACHMENT A
[Letter]

Superior Court of the State of Washington
for the County of Yakima
Judge Michael G. McCarthy
Department No. 2

Andre Penlaver
Stokes Lawrence Velkanje Moore and Short
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Fronda Woods
Assistant Attorney General
Licensing and Administrative Law Division
PO Box 40110
Olympia WA 98504-0110 July 22, 2015

Re: Cougar Den Inc. v. Department of Licensing
Yakima County Cause No. 14-2-03851-7

Dear Counsel:

This matter comes before the Court as an appeal under the Administrative Procedure Act from an assessment levied upon Cougar Den, Inc. (Appellant), by the Washington State Department of Licensing (Respondent) for unpaid fuel taxes and associated penalties.

Procedurally, this matter was heard by an Administrative Law Judge, who ruled for the Appellant. The Respondent appealed and prevailed before Pat Kohler, the Director of the Department of Licensing. The Appellant subsequently appealed to this court.

Appellant argues, pursuant to RCW 34.05.570(3)d, that the Director "erroneously interpreted or applied the law". This Court therefore considers the legal underpinnings of the decision under review de novo.

Cougar Den is a tribal corporation, doing business on the Yakama Reservation. The particular business involved in this case is the purchase of fuel in the State of Oregon, and its transport to the reservation. The transportation from the fuel terminal in Oregon to the reservation is made by a non-tribal commercial trucking firm. Cougar Den then sells the fuel, as a wholesaler, to other tribal corporations or members.

According to the Respondent, the transport of the fuel into the State of Washington creates a taxable event under RCW 82.36.020 and 82.38.030. The gravamen of the Appellant's argument is that Article III of the

Treaty with the Yakamas shields Cougar Den from the assessed tax.

The Treaty provides in pertinent part as follows:

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

It is well settled jurisprudence that a treaty entered into between the United States and any Indian tribe must be constructed as it would have been understood by the tribal members at the time of signing and any ambiguities in the document must be resolved in favor of the tribe. *Tulee v. Washington*, 315 U.S. 681, 684-5, 62 S. Ct. 862, 86 L. Ed. 1115 (1942).

We have the benefit of several decisions which have construed the right to travel provision of the Treaty with the Yakamas.

In *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), the Court reviewed the findings of the District Court, made after an extensive evidentiary hearing focused upon the intent of the parties to the Treaty in order to interpret the scope of the right to travel provision of Article III. The trial court found, and the Court of Appeals affirmed, the Treaty secured to the Yakamas the right to travel off the reservation for fishing, hunting, gathering and trade purposes. *Cree* at 770. And it was improper for the State to burden such travel with monetary assessments.

In *United States v. Smiskin*, 487 F.3 1260 (9th Cir. 2007), the Court recognized the inherent link between the right to travel and the right to trade. "[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate" the decision in *Cree v. Flores*, supra.

This interpretation of the right to travel in Article III of the Treaty is the only view that makes any sense. An aboriginal people would not be interested in securing a right to travel unless it had some purpose, such as trade.

Respondent relies upon *King Mountain Tobacco Company v. McKenna*, 768 F.3d 989 (9th Cir. 2014) for the proposition the Treaty does not reserve to the Yakamas the right to trade. The Respondent is correct that a freestanding right to engage in commerce is not the Treaty, but the *King Mountain* court affirmed the rulings in *Cree* and *Smiskin*, recognizing the right to travel encompassed a right to trade in conjunction with the travel.

Additionally, the taxable event in *King Mountain* was the sale of cigarettes, not their travel. See RCW 70.157.010 & .020. The Court correctly ruled that the Treaty did not shield the sale from taxation.

It is clear to this Court that Article III of the Treaty shields the transport of fuel, owned by Cougar Den and intended for sale to tribal members and entities on the reservation, from taxation under Title 82 of the Revised Code of Washington. The taxable event is the movement of the fuel across the Columbia River and into the State of Washington. And, under the terms of

the Treaty, this event cannot be taxed by the Respondent.

There is one factor which is troubling. The actual travel is not done by a member of the tribe or by a tribal entity. A private commercial trucking company, hired and directed by Cougar Den, actually conducts the transport. If the carriage of the fuel were done by Cougar Den or some other tribal entity, the Appellant's position would be unassailable. The question is whether the utilization of the non-Indian entity invalidates the Treaty's protection.

In *Cree v. Flores*, supra, the Court recognized that the right to travel can be exercised by tribal members or entities through non-Indian third parties. In *Cree*, logs owned by the tribe were transported on trucks owned by tribal members or entities to sawmills off the reservation. Some of the drivers were not members of the tribe. This circumstance did not invalidate the right to travel.

In the instant case, the fuel is purchased by Cougar Den, loaded onto a tanker truck owned by KAG West, a non-tribal trucking firm, driven into the State of Washington and delivered to the Appellant on the reservation and thereafter distributed to tribal members and tribal entities. The transporter, although it executes the taxable event of crossing the board and entering Washington, it is not liable for any tax. Only the owner of the fuel is subject to tax. (See Final Order of Director, Conclusion of Law #13) And the owner of the fuel is a tribal entity which has a right to travel in conjunction with trade. The purchase, transportation and delivery of fuel by a tribal entity for use by tribal members and entities is

clearly shielded by the Treaty. Consequently, the assessment of a fuel tax and associated penalties against Cougar Den by the Department of Licensing is null and void.

Cougar Den raises a second issue; the propriety of Pat Kohler, Director of the Department of Licensing, sitting in an adjudicatory capacity during the administrative review of this matter.

The record contains certain facts which implicate RCW 34.05.425 and the Appearance of Fairness Doctrine.

In the first instance, the parties to this proceeding are the Cougar Den, Inc., and the Department of Licensing. Incongruously, the director of the latter was an adjudicator of the issues which are now before this court.

Secondly, the assessment which is the focus of this litigation was ostensibly assessed pursuant to a Fuel Tax Agreement entered into between the Yakima Nation and the Department of Licensing in 2013. The Agreement (Attachment B to the Declaration of Harry Smiskin) is referenced in the written notification given to Cougar Den (Stipulated Exhibit No. 7). Pat Kohler negotiated the Agreement on behalf of the Department of Licensing and was a signatory to the Agreement.

The Declaration of Harry Smiskin further relates that Ms. Kohler, in the course of the negotiations, argued "the Treaty did not apply to taxes on imported fuel, even if the fuel was brought on state roads." This is precisely the issue she considered as an adjudicatory

officer in the course of the administrative appeal of this matter.

"The appearance of fairness doctrine is meant to prevent a biased or potentially interested judge from ruling on a case. Sustaining a claim that the appearance of fairness was violated requires evidence of the judge's bias. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." *Olympic Healthcare Services II LLC v. Department of Social & Health Services*, 175 Wn. App. 174, 304 P.3d 491 (2013) (citations and internal quotations omitted).

Although the Appearance of Fairness Doctrine applies only to judicial officers and to certain officials involved in land use decisions, RCW 34.05.425(3) makes it applicable to the administrative process followed in the instant case. The statute provides "[a]ny person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter *or for which a judge is disqualified.*" (emphasis added)

Although the Appellant did not raise the issue during the administrative adjudication, it has been raised now, primarily on the basis of Mr. Smiskin's sworn statement. Given the totality of the circumstances, a reasonably prudent and disinterested person would conclude Ms. Kohler's participation as an arbiter did not appear to be fair. Consequently, her decision should be vacated on this ground as well.

Mr. Penalver is requested to prepare appropriate Findings of Fact, Conclusion of Law and an Order.

Very truly yours,

s/ Michael G. McCarthy
Michael G. McCarthy
Judge

PROCEEDINGS BEFORE THE DIRECTOR OF THE DEPARTMENT OF LICENSING STATE OF WASHINGTON

In the Matter of the Fuel Tax Assessment Issued to: COUGAR DEN, INC., Respondent.	OAH Docket No. 2014-DOL-0006 Fuel Tax Assess. No. 756M FINAL ORDER OF DIRECTOR

I. DIRECTOR'S CONSIDERATION

1.1 Initial Order. This matter has come before the Director to review the Initial Order entered by Administrative Law Judge Stephen K. Leavell on July 24, 2014 (Initial Order), which is attached and incorporated into this Order by reference.

1.2 Petition for Administrative Review. The Prorate and Fuel Tax Program, Department of Licensing (Program), filed a petition for administrative review of the Initial Order on August 12, 2014. The Program argues that the Initial Order misread United States Supreme Court precedent and improperly characterized the legal incidence of the taxes at issue in this case as imposed on an Indian within an Indian reservation, where the legal incidence of the taxes is actually imposed at the point at which fuel entered into the state off-reservation, at the Oregon-Washington border.

The Program argues that the Initial Order also erroneously concluded that the fuel was exempt from fuel taxes because its sale on the reservation was in "interstate or foreign commerce," where the fuel

actually never left the state of Washington, and the reservation is part of the state.

Finally, the Program argues that the Initial Order erred in concluding that the Yakama Treaty precluded the state from taxing the imported fuel based on the treat right to travel upon the public highways, where *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) held only that Washington could not require tribal members to give notice to the state that they were transporting untaxed cigarettes for consumption on the reservation, but courts have not held that the state could not tax a product.

The Program filed a statement of additional authority in support of its petition for review on September 26, 2014. It is a copy of the Ninth Circuit decision in *King Mountain Tobacco Co., Inc. v. McKenna*, No. 13-35360, affirming the district court opinion cited in the Program's petition for review and holding that there is no "right to trade" in the Yakama Treaty.

Respondent Cougar Den, Inc. (Cougard Den) filed a response to the petition for review on August 26, 2014. Cougar Den argues that the Initial Order is correct and the Yakama Treaty is an express federal law that permits the Yakamas a "right to transport goods without restriction" and a "right to trade" free of any state tax or regulation. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) held that Yakama members could carry out logging operations outside the reservation without payment of fees for the use of public highways. *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) construed the right to travel provision of the Yakama Treaty as overlapping with the right to

trade under the Treaty. Cougar Den argues that the fuel taxes at issue are a tax on hauling goods to market over the public highways. Cougar Den filed a response to the Program's statement of additional authority on September 30, 2014, arguing that the treaty right to travel is dispositive of this case and distinguishing the *King Mountain* decision.

1.3 Record of Proceeding. The entire record of this proceeding was presented to the Director for her review and the entry of a final decision.

The description of the record in the "Exhibits" section of the Initial Order is incomplete and is MODIFIED to read as follows:

> The parties agreed to Stipulated Facts 1-18 and Exhibits 1-9. The following evidentiary materials were also submitted by the parties for the purposes of their cross-motions for summary judgment.

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY COUGAR DEN

Exhibit No.	Description
	Declaration of Kip Ramsey III (April 7, 2014)
Attachment A to Decl. of Kip Ramsey III	Invoices dated 4/28/2013, 6/15/2013, 7/13/2013, 8/6/2013, 9/10/2013, and 10/24/2013
	Declaration of Andre M. Penalver (April 11, 2014)
Attachment A to Decl. of Andre M. Penalver	Assessment Numbers 760M and 761M

Attachment A to Respondent's Supplemental Authority	Yakama Nation General Council Memorandum (April 2, 2014) Yakama Nation General Council Motion GCM-10-2014 (March 13, 2014) Yakama Nation General Council Resolution GC-03-2014 (March 21, 2014)
Attachment B to Respondent's Supplemental Authority	Yakama Nation General Council Resolution dated Feb. 18, 1944 Yakama Nation General Council Resolution T-86-80 (June 26, 1980)

ADDITIONAL EXHIBITS AND DECLARATIONS SUBMITTED BY DEPARTMENT OF LICENSING PRORATE AND FUEL TAX PROGRAM

Exhibit No.	Description
	Declaration of Paul W. Johnson (April 24, 2014)
Exhibit 1 to Decl. of Paul W. Johnson	Yakama Nation Petroleum Permits provided to Washington Department of Licensing Prorate and Fuel Tax Section between November 2012 and November 2013
Exhibit 2 to Decl. of Paul W. Johnson	Table A—Fuel Deliveries to Yakamart, March 1, thru October 31, 2013 Table B—Fuel Deliveries, January 1, thru December 21, 2013
	Declaration of John Lane (April 22, 2014)
Exhibit A to Decl. of John Lane	Yakama Nation Retrocession Petition (July 2012) pages 25 through 27
	Declaration of Fronda Woods (April 29, 2014)
Attachment A to Decl. of Fronda Woods	November 12, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler
Attachment B to Decl. of Fronda Woods	November 18, 2013 letter from Yakama Nation Chairman Harry Smiskin to Washington Governor Jay Inslee and Department of Licensing Director Pat Kohler

Attachment C to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. CV-12-3152-LRS, Order Granting Joint Motion to Dismiss With Prejudice and Without Costs (RD. Wash. Nov. 21, 2013)
Attachment D to Decl. of Fronda Woods	Washington v. Tribal Court for the Confederated Tribes & Bands of the Yakama Nation, No. 13-36161, Order (9th Cir. Nov. 22, 2013)
Attachment E to Decl. of Fronda Woods	November 19, 2013 letter from Yakama Nation General Council officers to Deputy and Assistant Attorneys General
Attachment F to Decl. of Fronda Woods	Emails between Quanah Spencer and Fronda Woods dated November 20 and 22, 2013
Attachment G to Decl. of Fronda Woods	Teo v. Steffenson, No. CY-93-3050-AAM, Consent Decree (E.D. Wash. Nov. 3, 1994), and Teo v. Steffenson, No. CV-04-3079-CI, Settlement Agreement, Agreed Changes to Consent Decree, and Order (E.D. Wash. Aug. 21, 2006)

1.4 Issue. The description in the "Issue" section of the Initial Order is incomplete and is STRICKEN in its entirety. The following issue statement is ADOPTED:

> Did Cougar Den import fuel to Washington from March through October 2013 in violation of chapters 82.36 and 82.38 RCW? If so, does Cougar Den owe $3,639,954.61 (as of December 9, 2013), including tax, penalties, and interest?

1.5 Findings of Fact. Having considered the record of this proceeding and the arguments of counsel, the Director ADOPTS Findings of Fact, 1, 2, 4-7, 9, 10, 12-14, 17, and 18 of the Initial order.

Finding of Fact 3 of the Initial Order is MODIFIED to conform to the stipulated facts to read as follows:

3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to the public at http://www.yak amanation-nsn.govidocs/CededMap0001.pdf.

Finding of Fact 8 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

8. On September 29, 1993, the Secretary of the Yakama Tribal Council issued a document to Cougar Den, Inc. entitled "Petroleum Products License Responsibilities." The Yakama Tribal Council revoked the document on October 2, 2013.

Finding of Fact 11 of the Initial order is MODIFIED to conform to the stipulated facts and correct a typographical error to read as follows:

11. Cougar Den has never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.

Finding of Fact 15 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

15. On December 9, 2013, the Washington Department of Licensing issued Assessment Number 756M to Cougar Den, Inc. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel shown in the above table.

Finding of Fact 16 of the Initial Order is MODIFIED to conform to the stipulated facts and correct typographical errors to read as follows:

16. The Respondent made a timely appeal of Assessment 756M through a Letter of Appeal, dated January 3, 2014, sent to the Department.

Additional Findings of Fact 19-23 are ADOPTED to read as follows:

19. Cougar Den contracted with KAG West to transport fuel in KAG West's trucks from Oregon to customers within the Yakama Reservation from March 2013 through October 2013. Decl. Ramsey ¶ 5; Stip. Ex. 5 (*see* "Schedule of Receipts" and "Schedule of Disbursements" pages).

20. When Cougar Den, Inc. sells fuel to a business, its invoice includes an amount for federal taxes and fees, and an amount for tribal taxes. Decl. Ramsey ¶ 6 & Attach. A. On October 2, 2013, the Yakama Tribal Council rescinded the tribal tax. Stip. Ex. 6.

21. Cougar Den sold more than 90 percent of the fuel it imported to Wolf Den and Kiles Korner, both in Wapato. Stip. Ex. 5 ("Schedule of Disbursements" pages). Wolf Den and Kiles Korner are retail gas stations owned and operated by Yakama tribal members under permits from the Yakama Nation. Decl. Johnson ¶ 3 & Ex. 1; *see* Decl. Ramsey Attach. A. Yakama tribal law allows tribally-licensed fuel retailers to sell to "any person." RYC § 30.11.09 (Stip. Ex. 9).

22. Cougar Den sold the remaining fuel it imported to Cougar Den, Inc. and Tiin-Ma

Logging, both in White Swan. Stip. Ex. 5 ("Schedule of Disbursements" pages). Cougar Den, Inc. is a retail gas station and restaurant owned by Kip Ramsey. Decl. Johnson ¶ 3 & Ex. 1; Decl. Ramsey ¶ 2. Tiin-Ma Logging is owned by Kip Ramsey. Decl. Ramsey ¶ 6 & Attach. A.

23. Before April 2013, Wolf Den, Kiles Korner, and Cougar Den bought fuel from Washington-licensed fuel suppliers. Decl. Johnson ¶ 6 & Exhibit 2, Table B.

1.6 Conclusions of Law. Having considered the record of this proceeding and the arguments of counsel, the Director STRIKES the Conclusions of Law of the Initial Order in their entirety.

The Director ADOPTS new Conclusions of Law 1-23 to read as follows:

Jurisdiction

1. There is jurisdiction to hear this matter pursuant to chapter 34.05 of the Revised Code of Washington (RCW), RCW 82.36.045, 82.38.170, and chapter 10-08 of the Washington Administrative Code (WAC).

Structure of Washington Fuel Tax Laws

2. Washington state law imposes a tax upon fuels used for the propulsion of motor vehicles upon the highways of the state. Chapter 82.36 RCW governs taxes on motor vehicle fuel, or gasoline. RCW 82.36.010(19); WAC 308-72-800(3). Chapter 82.38 RCW governs taxes on "special fuel," which includes diesel fuel. WAC 308-77-005(1); *see* RCW 82.38.020(23). Fuel taxes are imposed at the wholesale level, when fuel is removed from the

terminal rack or imported into the state. RCW 82.36.020(2) and 82.38.030(7). The current tax rate is 37.5 cents per gallon. RCW 82.36.025 and 82.38.030.

3. Fuel is "imported" when it is brought into this state by means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.36.010(10) and 82.38.020(12). A person who causes fuel to be imported by a means other than the bulk transfer-terminal system, who owns the fuel at the time of such importation, is acting as a fuel importer. *See* RCW 82.36.010(16) and 82.38.020(26). The "bulk transfer-terminal system" means the fuel distribution system consisting of refineries, pipelines, vessels, and terminals. RCW 82.36.010(4) and 82.38.020(4). Fuel in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system. RCW 82.36.010(4) and RCW 82.38.020(4).

4. Fuel imported into this state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce is exempt from tax. RCW 82.36.230; *see* RCW 82.38.180(2). Fuel distributed to a federally recognized Indian tribal reservation located within the State of Washington is not *considered exported outside this state.* RCW 82.36.230 and 82.38.180(2).

5. Fuel taxes are collected through a licensing system administered by the Department of Licensing. It is unlawful for a person to engage in business in Washington as a motor vehicle importer or special fuel importer without a license from the Department. RCW 82.36.080(1) and 82.38.090(1). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18).

6. Licensed importers are liable for taxes on fuel imported into this state. RCW 82.36.026(3) and 82.38.035(3). License holders must submit monthly fuel tax returns to the Department documenting their removals and imports. RCW 82.36.031 and 82.38.150. Payment of tax is required when the reports are submitted. RCW 82.36.035 and 82.38.160. Penalties and interest are due if the tax is not paid on time. RCW 82.36.040; 82.36.045; and 82.38.170.

7. Persons who import fuel into the state without a license are subject to the same taxes and penalties as licensees. RCW 82.36.100; *see* RCW 82.36.045(2); 82.36.080(3); and 82.38.170(3). A person who imports motor vehicle fuel into the state without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3).

8. The Department is authorized to access taxes, penalties, and interest. RCW 82.36.045; 82.36.080(3); and 82.38.170. Where the validity of the Department's assessment is questioned, the burden is on the person who challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

Cougar Den is Liable for the Tax Absent Express Federal Law to the Contrary

9. The Department asserts that Cougar Den imported fuel into the state of Washington without the licenses required by state law and failed to pay the taxes required by state law. The Department issued Assessment Number 756M to Cougar Den. Stip. Ex. 7. Cougar Den has the burden to establish by a fair preponderance of evidence that Assessment Number

756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

10. Cougar Den argues that it is exempt from the tax because of Bulk User Petroleum Permits the Yakama Nation issued to Cougar Den in 2012 and 2013 (Stip Ex. 4), and because of a Petroleum Products License Responsibilities document that the Secretary of the Yakama Tribal Council issued to Cougar Den in 1993 (Stip. Ex. 3). Cougar Den relies on the Yakama Treaty of 1855 (Stip. Ex. 1). The fuel was transported from the state of Oregon across ceded lands and Yakama Reservation lands, and delivered to Yakama-owned businesses within the Yakama Reservation. Cougar Den argues that, based on case law, it is exempt from state fuel tax and licensing requirements. Cougar Den relies primarily upon *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

11. Outside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). Whether a state can impose a tax that affects Indians depends on where the tax is imposed and who bears its legal incidence. If the tax is imposed outside an Indian reservation, the tax is enforceable absent express federal law to the contrary. *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 132 L. Ed. 2d 400 (1995).

12. Under RCW 82.36.020(2)(c) and 82.38.030(7)(c), Washington fuel taxes are imposed

when fuel "enters into this state" if the "entry is not by bulk transfer" or if the entry is by bulk transfer and the importer is not a licensee. The fuel at issue in this matter enetered into this state at the Highway 97 bridge across the Columbia River. *See* Stip. Fact 13. The entry was not by bulk transfer because it was not a transfer by pipeline or vessel. RCW 82.36.010(3) and 82.38.020(5). Therefore, the taxes in this matter were imposed when the fuel entered into this state at the Washington-Oregon boundary on the Highway 97 bridge, which is not within any Indian reservation. *See* Stip. Ex. 2.

13. The person who is liable for Washington fuel taxes is a "licensee," or a person acting as a licensee if the person does not have a license. RCW 82.36.020(1); 82.36.100; and 82.38.030(1); *see* RCW 82.36.045(2) and 82.38.170(3). "Persons" include corporations. RCW 82.36.010(20) and 82.38.020(18). Cougar Den is a corporation. Stip. Fact 7. Cougar Den owned the fuel at the time the fuel entered into this state. *See* Stip. Ex. 5. Cougar Den did not have a license. Stip. Fact 11. Cougar Den acted as a licensee because it imported fuel into the state by tank truck, which is a means other than the bulk transfer-terminal system. RCW 82.36.020(10), (12), (16) and 82.38.01(12), (15), (26). Therefore, Cougar Den bears the legal incidence of the tax.

14. Cougar Den caused fuel to be imported from Oregon to customers within the Yakama Reservation. The Yakama Reservation is a federally recognized Indian tribal reservation located within the state of Washington. *See, e.g., Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. 463, 469, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Cougar Den did not export the fuel outside the state of Washington because fuel distributed to a federal recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state. RCW 82.36.230; RCW 82.38.180(2). The lands that the Yakama Nation ceded to the United States in Article I of the Yakama Treaty are also within the State of Washington. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 196, 39 S. Ct. 203, 63 L. Ed. 555 (1919). Therefore, the fuel that Cougar Den imported is not exempt from tax under RCW 82.36.230 or 82.38.180(2).

15. Cougar Den imported gasoline without a license from the department. A person who imports gasoline without a license is subject to a civil penalty of one hundred percent of the unpaid tax. RCW 82.36.080(3). If Cougar Den is liable for the unpaid tax, Cougar Den is also subject to the civil penalty for unlicensed gasoline imports.

16. Because the taxes, license requirements, and penalties in this matter are imposed outside of any Indian reservation, they are enforceable against Cougar Den absent express federal law to the contrary.

Federal Law Does Not Preempt the State Laws at Issue

17. Cougar Den asserts that the Yakama Treaty is "express federal law" that preempts the taxes, license requirements, and penalties in this case. Article III of the Yakama Treaty provides that, "if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public

highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways." 12 Stat. at 952-53 (Stip. Ex. 1). Members of the Yakama Nation view the Treaty as a "sacred" and "founding" document of the Yakama Nation. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38, 1262 (E.D. Wash. 1997), *aff'd sub. nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

18. In *Yakama Indian Nation v. Flores*, the court held that Article III of the Yakama Treaty preempted Washington state truck license and permit fees as applied to Yakama Indian-owned logging trucks that hauled Yakama Nation timber from Yakama Reservation forests over state highways to off-reservation mills. The fees were a direct charge of the Yakamas' use of public highways and were not apportioned to account for off-reservation travel. The Ninth Circuit affirmed, concluding that the right "to travel upon all public highways" clause in Article III of the Yakama Treaty "must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Cree v. Flores*, 157 F.3d at 769. The *Flores* Court held that the truck license and permit fees involved in the liquidation were preempted by the Yakama Treaty "right, in common with citizens of the United States, to travel upon all public highways."

19. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), federal officials suspected that Yakama tribal members were transporting contraband cigarettes from an Indian reservation in Idaho to various Indian reservations in Washington. The federal government indicted the members on charges of violating the federal Contraband Cigarette

Trafficking Act. The basis for the charges was the members' alleged failure to comply with a Washington state requirement that individuals give notice to state officials before transporting unstamped cigarettes within the state. The Ninth Circuit held that the notice requirement imposed a condition on travel that violated the "right, in common with citizens of the United States, to travel upon all public highways" in Article III of the Yakama Treaty.

20. Unlike the fees in the *Flores* litigation, the taxes in this matter are not a charge for Cougar Den's use of public highways. Cougar Den is not being taxed for using public highways. Cougar Den is being taxed for importing fuel. Unlike the notice requirement in *Smiskin*, the license requirements in this matter are not a condition on Cougar Den's use of public highways. Cougar Den does not need a Washington fuel importer license to transport fuel over public highways. Cougar Den needs a Washington fuel importer license to bring fuel into this state. The taxes, license requirements, and penalties in this matter are not preempted by Article III of the Yakama Treaty as construed in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

21. The Bulk User Petroleum Permits and Petroleum Products License Responsibilities document that the Yakama Nation issued to Cougar Den do not exempt Cougar Den from the state laws involved in this case. *See Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 525, 648 P.2d 468 (1982). Though federal law can preempt state law, tribal law standing alone does not. *Washington v. Confederated*

Tribes of the Colville Indian Reservation, 447 U.S. 134, 158, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

Conclusion

22. Cougar Den has not met its burden to establish by a fair preponderance of evidence that Assessment Number 756M is erroneous or excessive. RCW 82.36.045(2) and 82.38.170(3).

23. Respondent Cougar Den imported fuel to Washington from March through October 2013 in violation of chapter 82.36 and 82.38 RCW. Cougar Den owes $3,639,954.61 (as of December 9, 2013) including tax, penalties, and interest.

II. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Director **ORDERS**:

2.1 The Initial Order is REVERSED, and the Program's assessment of taxes against Cougar Den, Inc. for importation of special fuel and motor vehicle fuel under Assessment Number 756M is upheld. The current amount owing and payment instructions may be obtained by contacting the Prorate and Fuel Tax Program of the Department of Licensing.

2.2 **Reconsideration.** Pursuant to RCW 34.05.470, a party has ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any

argument in support thereof, should be filed by mailing or delivering it directly to the Director of the Department of Licensing, P.O. Box 9020 Olympia, Washington 98507-9020, with a copy to all other parties of record and their representatives. **Filing means actual receipt of the document at the Director's office**, RCW 34.05.010(6). A copy shall also be send to Bruce L. Turcott, Assistant Attorney General, Review Counsel for the Director, PO Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

2.3 **Stay of Effectiveness.** The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Director has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

2.4 **Judicial Review.** Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Department, the Office of the Attorney General, and all parties within thirty days after

service of the final order, as provided in RCW 34.05.542.

2.5 **Service.** This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

DATED this 15th day of October, 2014.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING

By: s/ Pat Kohler
PAT KOHLER
Director

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LICENSING

In the Matter of Fuel Tax or Prorate Assessment Issued to, COUGAR DEN, INC., Respondent.	Case No.: 2014-DOL-0006 Agency No. 756M STIPULATION OF FACTS AND ADMISSIBILITY OF DOCUMENTS

STIPULATION OF FACTS

The Washington State Department of Licensing ("the Department") and Respondent Cougar Den, Inc. submit the following Stipulated Facts in the above-entitled proceeding.

1. The Confederated Tribes and Bands of the Yakama Nation (referred to in this proceeding as "Yakama Nation"), is a federally recognized Indian tribe.

2. The Yakama Reservation was established by the Yakama Treaty of June 9, 1855, 12 Stat. 951. Its boundaries are described in Article II of the Treaty. The ceded lands of the Yakama Nation are described in Article I of the Treaty.

3. In entering into the Treaty of 1855, the Yakama Nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama Nation and is available to

the public at http://www.yakamanation-nsn.gov/docs/CededMap0001.pdf.

4. The Yakama Nation is a governmental authority that exercises jurisdiction within the Yakama Indian Reservation.

5. Richard "Kip" Ramsey is an enrolled member of the Yakama Nation.

6. Kip Ramsey is the owner and president of Respondent Cougar Den, Inc.

7. Cougar Den, Inc. is a private Yakama Indian-owned company incorporated under the laws of the Yakama Nation. The business office of Cougar Den, Inc. is located within the Yakama Reservation. Cougar Den Inc. is registered as a foreign corporation with the Washington Secretary of State.

8. On September 29, 1993, the Secretary of the Yakama Tribal Council issued a document to Cougar Den, Inc. entitled "Petroleum Products License Responsibilities." The Yakama Tribal Council revoked the document on October 2, 2013.

9. Since February 2012, Cougar Den, Inc. has held a motor vehicle fuel dealer's license issued by the State of Oregon.

10. In June 2012 and May 2013, Cougar Den, Inc. was issued a Bulk User Petroleum Permit by the Yakama Nation.

11. Cougar Den has never applied for or held any type of motor vehicle fuel license or special fuel license issued by the State of Washington.

12. In March 2013, Cougar Den, Inc. began exporting motor vehicle fuel (gasoline) and special fuel

(diesel fuel) from Oregon to locations within the Yakama Reservation. Cougar Den Inc. filed reports with the Oregon Department of Transportation, Fuels Tax Group, showing the number of gallons exported. The following table shows the number of gallons that Cougar Den Inc. exported from Oregon to the Yakama Reservation between March 2013 and October 2013, as reported to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
March 2013	18,501	23,157
April 2013	304,199	163,344
May 2013	320,652	195,661
June 2013	529,753	321,623
July 2013	537,547	295,101
August 2013	602,136	320,669
September 2013	540,516	360,579
October 2013	596,464	351,606

13. The trucks that transported the petroleum products described in the above table from Oregon to the Yakama Indian Reservation remained at all times in the state of Oregon, the Ceded Area of the Yakama Nation, or the Yakama Reservation. The trucks left Interstate 84 at Biggs Junction, Oregon, and took U.S. Highway 97 from there to the Yakama Reservation.

14. Cougar Den Inc. did not pay Washington fuel taxes on the fuel described in the above table.

15. On December 9, 2013, the Washington Department of Licensing issued Assessment Number 756M to Cougar Den, Inc. Assessment Number 756M described the taxes, penalty, and interest the Department asserted were then owed to the State of Washington with respect to the fuel shown in the above table.

16. The Respondent made a timely appeal of Assessment 756M through a Letter of Appeal, dated January 3, 2014, sent to the Department.

17. The Department referred the appeal to the Office of Administrative Hearings. On February 24, 2014, Administrative Law Judge Stephen K. Leavell issued a Notice of Prehearing Conference. Administrative Law Judge Robert Boggs conducted a prehearing conference on March 11, 2014, and Administrative Law Judge Stephen K. Leavell issued a Notice of Hearing and Prehearing Conference Order on March 12, 2014.

18. On March 31, 2014, the Department filed a Motion to Correct the Caption to delete Kip Ramsey as a respondent, leaving Cougar Den, Inc., as the sole respondent.

These stipulated facts are jointly submitted to the Office of Administrative Hearings by Cougar Den, Inc. and the Washington State Department of Licensing. Pursuant to the Prehearing Conference Order, the parties may also file affidavits or declarations which do not conflict with these stipulated facts.

STIPULATED EXHIBITS

The parties stipulate to the admissibility of the following attached exhibits:

Exhibit No.	Description
1.	Treaty With the Yakamas, 12 Stat. 951 (June 9, 1855)
2.	Map – Ceded Area and Reservation Boundary of the Confederated Tribes and Bands of the Yakama Nation (Geographic Information Systems, Yakama Nation, May 27, 2009)
3.	Petroleum Products License Responsibilities (September 29, 1993)
4.	Yakama Nation Bulk User Petroleum Permits 05-12 and 03-13
5.	State of Oregon Motor Vehicle Fuel and Aircraft Fuel License Tax Reports submitted to the Oregon Department of Transportation by Cougar Den Inc., for the months of March 2013 through October 2013
6.	Resolution T-002-14
7.	Assessment Number 756M
8.	Fuel Tax Agreement Concerning Motor Vehicle Fuel and Special Fuel Between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington (effective date of November 22, 2013)
9.	Revised Yakama Nation Law and Order Code, chapter 30.11

The parties reserve the right to offer additional exhibits, subject to objections regarding admissibility.

DATED this 5th day of April, 2014.

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RECORD AND BRIEFS

No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
a Yakama Nation Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Treaty of 1855 between the Yakama Nation and the United States secures to the Yakama Nation the right to travel upon the public highways. The question presented is whether the imposition of a Washington state tax upon a member of the Yakama Indian Tribe for importing fuel into Washington upon the public highways is preempted by the treaty, as has been consistently held by both the Ninth Circuit and now the Washington Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Respondent is Cougar Den, Inc. There is no parent or publicly held company owning 10% or more of its stock.

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OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). Petitioner's App. 1a-29a. The order of the Yakima County Superior Court is unreported. Pet. App. 30a-43a. The administrative order of Pat Kohler, the Director of the Department of Licensing, is unreported. Pet. App. 44a-61a. The order of Administrative Law Judge Stephen K. Leavell is unreported. Resp. App. 1-17.

TREATY AND STATUTES INVOLVED

Article III of the Treaty of June 9, 1855, between the Confederated Bands of the Yakama Nation and the United States, 12 Stat. 951, 952-953, which states:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Former Revised Code of Washington § 82.36.010, et seq. (Motor Vehicle Fuel Tax). Resp. App. 18-20.

Former Revised Code of Washington § 82.38.010, et seq. (Special Fuel Tax Act). Resp. App. 21-23.

STATEMENT OF THE CASE

This case is another chapter in the Petitioner's long campaign to maximize revenue by infringing on treaty rights. It is the continuation of a local revenue dispute between Washington and the sovereign Yakama Nation. The Washington state court's decision below turned on the application of a statutory term in Washington's fuel tax code and its conflict with a treaty provision found in only two other treaties. This is not an issue of national importance. The decision below is consistent with Ninth Circuit precedent and presents no reason to grant certiorari.

I. Factual Background

A. The Yakama Indian Nation

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian tribe located in central Washington. Pet. App. 62a. The modern Yakama Nation was formed in 1855 when the United States government executed a treaty with the fourteen tribes and bands that would comprise the Nation. *Id.* That treaty provided for a reservation and defined the rights of the Yakamas, in exchange for the Yakama Nation's agreement to "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them" in the Washington Territory. Treaty with the Yakamas, Art. I, 12 Stat. 951 (1855).

To the members of the Yakama Nation the Treaty is a sacred document: "[the Treaty] embodies spiritual as well as legal meaning for the tribe; it enumerates basic rights secured to the Yakamas that encompass their entire way of life." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997), *aff'd, Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*"Cree II"*).

The Yakama Nation forever ceded 10 million acres – over ninety percent of its territory – in exchange for rights reserved by the Treaty. The basic rights reserved include those contained in Article III:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.
>
> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries; and pasturizing their horses and cattle upon open and unclaimed land.

Treaty with the Yakamas, Art. III, 12 Stat. 951 (1855).

Of these rights, the Right to Travel was particularly important to the Yakama Nation. No other tribal treaty in Washington contains a right to travel. Before the treaty, travel was "an intrinsic ingredient of virtually every aspect of Yakama culture." *Yakama Indian Nation*, 955 F. Supp. at 1238.[1] "Travel was particularly important for the purpose of trade" and at the time of the Treaty the Yakamas' "proclivity for trade was equal to that of the whites, as the Yakamas constantly moved goods back and forth between the Coast and Interior and obtained access to goods from the Plains." *Id.* This occurred in part because "[t]he Yakamas' way of life depended on goods that were not available in the immediate areas," including items "of vital religious and ceremonial importance." *See id.* at 1238-39. Sensitive to these trading practices, government agents promised the Yakamas that they would "have the same liberties outside the reservation . . . *to go on the roads to market*." *Id.* at 1244. Relying on the promises of the government agents – and in exchange for most of their traditional homeland – "the Yakamas agreed to the Treaty provisions in good faith on June 9, 1855." *Id.* at 1245.

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[1] As will be shown below, the historical findings contained in *Yakama Indian Nation v. Flores* are of central interpretive importance in this case, and were unchallenged by the Petitioner below.

B. Respondent Cougar Den

Cougar Den, Inc. is a private business owned by an enrolled member of the Yakama Nation and organized under the laws of the Yakama Nation. Pet. App. 63a. Established as a means of supplying fuel to members of the Yakama Nation, Cougar Den verifies that its sales are to enrolled members of the Yakama Nation by placing the enrollment number of its buyers on its sales invoices. CP 471, 474-79.

The Yakama Nation appointed Cougar Den as its agent "for the purpose of collecting and transmitting tribal fuel taxes to the Yakama Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to its members." *See* Pet. App. 66a (referencing Exhibit 3). The Yakama Nation has also issued a license for Cougar Den to import fuel for every year at issue, and granted Cougar Den "the privilege of taking delivery of petroleum in bulk without assessment of state fuel taxes [p]rovided that compliance is maintained with the laws of the Yakama Nation." *Id.* (referencing Exhibit 4). Pursuant to this license, Cougar Den assesses federal and tribal taxes on its sales, but does not assess state taxes. Pet. App. 63a-64a.

Cougar Den began hauling fuel from Oregon to the Yakama Reservation on March 20, 2013. *Id.* Cougar Den used its own trucks and those of KAG West, an agent of Cougar Den that hauls fuel at Cougar Den's direction. CP 471. At all relevant times Cougar Den's trucks remained in either Oregon, the Ceded Area of

the Yakama Nation, or the Yakama Reservation. Pet. App. 64a. Each month, Cougar Den filed reports with the Oregon Department of Transportation showing the number of gallons exported. *Id.*

C. The Washington State Department of Licensing Issues Assessment No. 756M

In December 2013, the Washington State Department of Licensing ("Department") issued Assessment No. 756M against Kip Ramsey, as the owner of Cougar Den. Pet. App. 65a. The Assessment alleged that Mr. Ramsey owed $3,630,954.61,[2] including $1,292,913.02 in penalties, for not having a Washington import license during the months of March through October 2013. Pet. App. 65a (referencing Exhibit 7). This was the first notice to Cougar Den of any taxes, penalties, or interest owing for Cougar Den's fuel business. CP 471.

D. The History of Washington State's Fuel Taxation System

To support the Assessment, the Department cited Washington's motor and special fuel tax codes and a proposed Fuel Tax Agreement with the Yakama Nation that the Yakama Nation General Council had vetoed before it would have taken effect. CP 215-223. The Department's pursuit of this Assessment is indicative of

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[2] The tax was assessed at a rate of 37.5 cents per gallon. Former Wash. Rev. Code §§ 82.36.025 & 82.38.030.

Washington State's ongoing efforts to infringe on tribal treaty rights for the sake of taxing motor vehicle fuels sold by tribal retailers.

Washington's fuel tax system is premised on a four-tier distribution chain, consisting of "suppliers," "distributors," "retailers," and "consumers," with suppliers at the top of the chain. Suppliers are (a) refineries and (b) those who bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. Wash. Rev. Code § 82.36.020(1), (2). Washington currently imposes fuel taxes at the wholesale level when fuel is removed from the terminal rack or "imported" into the state. Wash. Rev. Code §§ 82.36.020(2) & 82.38.030(7).[3] Fuel is "imported" when a party brings it into Washington by means of conveyance other than the fuel supply tank of a motor vehicle. Former Wash. Rev. Code §§ 82.36.020(2) & 82.38.030(7) (2007).

Though this is the current fuel taxation scheme, the Washington Legislature has repeatedly amended its fuel tax collection system in a series of attempts to alter the legal incidence of the tax. These efforts began in response to this Court's decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), and

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[3] Washington state imposes taxes on motor vehicle fuel and taxes on special fuel, including diesel, under former Revised Code of Washington chapters 82.36 & 82.38. In 2013, the Legislature combined the two chapters and recodified them, but did not substantively amend them. H.B. 1883, 63d Leg., Reg. Sess. (Wash. 2013). In this brief, Respondent cites exclusively to the statutes as they existed during the relevant time period, prior to recodification.

continued in the wake of a series of judicial decisions prohibiting the Department from collecting tax on fuels sold on tribal lands. *See, e.g.*, *Squaxin Island Tribe v. Stephens*, 2006 WL 521715 (W.D. Wash. Mar. 2, 2006) (permanently enjoining state from "imposing or collecting motor vehicle fuel taxes, or otherwise seeking to enforce RCW chapter 82.36 with respect to motor vehicle fuels, delivered to, received by, or sold by [tribal plaintiffs'] retail fuel stations within their respective Indian Country" after recognizing 1998 fuel tax amendments failed to move the incidence off of tribal retailers); *Automotive United Trades Org. v. State*, 183 Wash. 2d 842, 845-46, 357 P.3d 615 (2015) (detailing Washington's attempts to collect tribal fuel taxes following *Oklahoma Tax Commission v. Chickasaw Nation*). The *Squaxin Island* decision resulted in the current tax scheme, enacted in 2007, which purports to place the incidence of the fuel tax at the supplier level, away from retailers. *See Automotive United*, 183 Wash. 2d at 848-49; Wash. Rev. Code §§ 82.36.020(2) (2007) & 82.38.030(7) (2007); *but see Automotive United*, 183 Wash. 2d at 848-50 (recognizing that the federal injunction is still in effect and that "no court has ever analyzed whether the 2007 legislation successfully moved the legal incidence of the tax off of tribal retailers").

Concurrent with its attempts to move the legal incidence of the tax, the Washington Legislature also authorized the Governor or the Governor's designee (generally the Director of the Department of Licensing) to enter fuel tax agreements with federally recognized

tribes operating or licensing retail gas stations on their lands. *See* former Wash. Rev. Code §§ 82.36.450 & 82.38.210 (2007). Under these agreements, tribes agree to purchase the fuel sold at tribally owned retail gas stations from state-licensed fuel distributors with the state fuel tax included. These agreements are limited to motor vehicle fuel (gasoline) and special fuel (diesel) taxes included in the price of fuel delivered to a tribally licensed retail gas station entirely owned by a tribe, tribal enterprise, or tribal member on reservation or trust land. Since 2007, Washington has entered many "75 Percent Refund/25 Percent (75/25) State Tax Agreements" with tribes who operate gas stations. *See* Wash. State Dep't of Licensing, Tribal Fuel Tax Agreement Report: June 2013, at 1-2 (2013). These tribes report their purchases to the Department and receive 75 percent of the state fuel tax revenue collected as a refund; the state retains 25 percent as state tax. *Id.* at 3. These agreements have mollified Washington State, resolving most of the litigation between it and the tribes.[4] *See Automotive United*, 183 Wash. 2d at 848-51.

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[4] Washington State's fuel tax agreements with the tribes upset others in the fuel industry, including the Automotive United Trades Association and Washington Oil Marketers Association, who believe that these agreements give tribal retailers an unfair competitive advantage and enable tribal retailers to undercut nontribal retailers' fuel prices. *See Automotive United Trades Org. v. State*, 175 Wash. 2d 214, 285 P.3d 52 (2012); *Automotive United*, 183 Wash. 2d at 845-46. None of the tribes that entered these agreements executed treaties reserving the right to travel.

E. There Is No Fuel Tax Agreement with the Yakama Nation

But there is no fuel tax agreement with the Yakama Nation. Indeed, this case is merely the latest disagreement between members of the Yakama Nation and the Department regarding Washington State's fuel taxation authority under state law. *See, e.g.*, *id.*; Wash. State Dep't of Licensing, Tribal Fuel Tax Agreement Report: November 2014, at 1-2 (2014).

To address these disagreements, the Yakama Nation Tribal Counsel and the Department participated in a series of mediation sessions in 2013. These sessions resulted in a proposed fuel tax agreement that would have gone into effect November 22, 2013. *See* Pet. App. 66a (referencing Exhibit 6). However, the Yakama Nation General Council (a body of the general membership) vetoed the proposed resolution on November 7, 2013. *See id.* The Yakama Nation sent notice of the veto to the Washington State Attorney General on November 19, 2013. CP 575.

The Department issued Assessment No. 756M to Cougar Den shortly thereafter. Pet. App. 65a.

II. Course of Proceedings

Kip Ramsey and Cougar Den filed a timely appeal of the Assessment with the Department.[5] On appeal,

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[5] The Department moved to dismiss Mr. Ramsey on March 31, 2014. Pet. App. 65a. Cougar Den was the sole defendant below and is the only respondent on appeal.

Administrative Law Judge Stephen K. Leavell invalidated the Assessment. *See* Resp. App. 1-17. He cited the extensive factual record developed in an earlier federal action, *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). *Yakama Indian Nation* was an action on remand from the Ninth Circuit; the Ninth Circuit directed the federal court to conduct "a factual investigation into the historical context and parties' intent at the time the Treaty was signed [in order to] determine the precise scope of the highway right." *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996) ("*Cree I*"). The district court accomplished this by "examin[ing] the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed." *Yakama Indian Nation*, 955 F. Supp. at 1235 (quoting *Cree I*, 78 F.3d at 1405). Following this hearing, the court entered extensive Findings of Fact and Conclusions of Law. *See generally* 955 F. Supp. 1229.

Relying on these findings, this Court's canons of treaty construction, and a series of Ninth Circuit opinions addressing the scope of the Yakama's Right to Travel, ALJ Leavell granted Cougar Den's motion for summary judgment and held that the Assessment was an impermissible restriction on travel under the Treaty. *See* Resp. App.

The Department sought review of this order. The Department's Director, Pat Kohler, reversed the ALJ decision. Pet App. 44a-61a. Director Kohler had represented the Department in the 2013 mediations with the Yakamas, arguing for a narrow interpretation of

the Treaty and the Right to Travel. *See* Pet. App. 41a-43a. On review of ALJ Leavell's order, Director Kohler – this time acting as a decision-maker on the scope of the Treaty rather than as an advocate – held that the Treaty did not preempt the taxes, license requirements, and penalties sought against Cougar Den. Pet. App. 59a.

Cougar Den appealed to the Yakima County Superior Court, which reversed the Director, finding that the Assessment violated Article III of the Treaty and that Director Kohler violated the appearance of fairness doctrine by failing to disqualify herself on an issue where she had previously acted as advocate. Pet. App. 30a-35a. The Department then appealed directly to the Washington Supreme Court, which affirmed on statutory and treaty grounds; it did not reach the appearance of unfairness issue. Pet. App. 1a-16a.

Though every objectively neutral court or adjudicative authority to consider this issue has rejected the Department's arguments and ruled in favor of Cougar Den, the Department now seeks certiorari.

ARGUMENT

I. The Meaning of the Treaty Right to Travel

This Court construes Indian Treaties as the Indians would have understood them.

> The Indian Nations did not seek out the United States and agree upon an exchange of

> lands in an arms-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them. . . .

Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970) (citations omitted) (citing *Jones v. Meehan*, 175 U.S. 1, 11 (1988); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)). This principle of construction requires courts to examine the language of Indian Treaties as such terms were understood by the Indians. *See Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*"Cree II"*); *see also Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-78, *modified*, 444 U.S. 816 (1979). Treaties are interpreted broadly, with doubtful or ambiguous terms resolved in the Indians' favor. *Choctaw Nation*, 397 U.S. at 631.

The seminal case construing the historical meaning of the Right to Travel language in Article III of the Treaty of 1855 is *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997), *aff'd*, *Cree II*. The district court decision followed a remand from the Ninth Circuit with instructions to "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right" found at Article III. *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996). The district court held an extensive bench trial on the issue of the intent of the parties to the Treaty. After

hearing testimony from the Yakama Indian Nation and the Department, including testimony from three expert witnesses, two plaintiffs, and two Washington State employees, the district court entered extensive Findings of Fact and Conclusions of Law that have guided every subsequent inquiry into the meaning of the Treaty Right to Travel. *Yakama Indian Nation*, 955 F. Supp. at 1236-56. These are unchallenged in this case.

The district court's factual findings highlighted the importance of travel for the purposes of trade: "The record as a whole unquestionably depicts a tribal culture whose manner of existence was ultimately dependent on the Yakamas' ability to travel." *Id.* at 1239. The court also found that Governor Stevens, who was responsible for treating with the Yakama Nation on behalf of the United States, knew of the importance of travel during his negotiations and that this knowledge was specifically illustrated by the unique promises given to the Yakamas regarding their ability to travel off reservation. *Id.* at 1240. During negotiations, the court emphasized Governor Steven's promise that "'[tribal members] shall have the same liberties outside the reservation . . . *to go on the roads to market.*'" *Id.* at 1244 (alteration in original).

The court rejected the government's contention that the term "in common with" "placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.* at 1247. It instead concluded that "the term was understood by the Yakamas and [the United

States] alike to mean that the [Yakamas] retained the *right* to travel the public roads, on and off reservation." *Id.*

The court also spoke to the agreement between the parties. In exchange for the right to travel off reservation "without restriction," the court observed that the Nation agreed to cede over 10 million acres of their traditional territory and to live on reservation. *Id.* at 1248. Specifically, the court found that the bargain provided that

> the tribe must agree to allow roads, including railroads, to be constructed within the reservation boundaries. These were the terms of the bargain; ***no reference is made to other conditions such as payment for or maintenance of public roads***, either on or off reservation. Rather, the accessibility of the public roads was described as an advantage for the Yakamas, without any mention of possible disadvantages, such as paying for or maintaining public roads.

Id. (emphasis added). The district court concluded by expressly finding that "the public highways clause reserves to the Yakamas the right to travel the public highways without restriction." *Id.* at 1249.

The Ninth Circuit affirmed on appeal. *Cree II*, 157 F.3d 762 (1998). That court referenced and reiterated the district court's factual findings and conclusions of law before confronting and rejecting each of the defendants' arguments – arguments that the Department recycles in its Petition. *See id.* at 766-68, 770-73.

Specifically, the Ninth Circuit affirmed each of the district court's findings and conclusions regarding the treaty language, the historical context of the Yakama Treaty, and the district court's "practical construction" of the Treaty. *Id.* at 770-73.

Accordingly, the district court's findings and conclusions in *Yakama Indian Nation* have been the foundation of any analysis of the Treaty Right to Travel.

II. Reasons for Denying the Petition

Three issues are presented by the Petition.

The first issue concerns the Washington Supreme Court's holding that the Treaty's reservation of the Yakamas' Right to Travel, which the Ninth Circuit has repeatedly interpreted to include the right to bring goods to market without the payment of fees, preempts Washington State's tax assessed for the importation of fuel into Washington. The Department argues this decision conflicts with Ninth Circuit precedent, specifically with the holding in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There is no conflict: the holding flows directly from the line of Ninth Circuit cases interpreting Article III of the Treaty, including *King Mountain Tobacco*. The allegation of a conflict in authority is unfounded and provides no basis for the writ to issue.

Second, the Department challenges the Washington Supreme Court's reliance on the factual record

regarding the historical meaning, context, and understanding of the Right to Travel provision by the Yakamas, arguing that this Court's precedent requires a plain language inquiry to determine whether the Treaty preempts Washington's import tax. But this argument is flatly incorrect. The state court properly applied well-settled principles of treaty construction. The state court's ultimate holding is consistent with this Court's decisions interpreting analogous provisions of the same treaty for over 80 years.

Finally, the Department is implicitly asking this Court to correct the Washington Supreme Court's interpretation of the function of Washington state's "import" tax, former Revised Code of Washington sections 82.36.020(2) & 82.38.030(7). The Department's challenge to a state court's construction and application of a unique state law does not merit certiorari. Regardless, the Department cannot demonstrate any error.

A. The Washington Supreme Court Faithfully Applied a Line of Ninth Circuit Decisions Interpreting the Right to Travel Under Article III of the Treaty

1. The Ninth Circuit Has Consistently Held That the Treaty Preempts State Law Restrictions on Travel, Including Restrictions on the Right to Bring Goods to Market, But Not Restrictions on Trade That Are Unconnected to Travel

Following *Cree II*, the Ninth Circuit construed Article III of the 1855 Treaty several times, most significantly in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), and *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). These cases reaffirmed that the Treaty guarantees the Yakama Nation and its members the "'*right to transport goods to market without restriction.*'" *King Mountain Tobacco*, 768 F.3d at 998 (quoting *Smiskin*, 487 F.3d at 1266) (emphasis in original). Critically, these cases, along with *Cree II*, also define the scope of the Treaty Right to Travel.

The Ninth Circuit first refused to divorce trade from the Right to Travel in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). *Smiskin* considered whether a Washington state law requiring persons who were not licensed wholesalers and who transported unstamped cigarettes to "give[] notice to the [Liquor Control Board] in advance of the commencement of transportation" violated the Treaty Right to Travel. Under state law, the failure to give notice or

pay the tax rendered the cigarettes contraband. *Id.* at 1263. The Smiskins, both Yakama Nation citizens, were arrested for transporting cartons of unstamped cigarettes from an Indian reservation in Idaho to smoke shops on various Indian reservations throughout Washington.

As the starting point for its analysis, the Ninth Circuit reaffirmed that the 1855 Treaty language guarantees the Yakama Nation "'the right to transport goods to market over public highways without payment of fees for that use'" and expressly rejected the position that the Department advocates here by holding that the Right to Travel is not limited to providing protection from state fees. *Compare id.* at 1265 (declining to draw the state government's fee-based distinction), *with* Petition at 15 (arguing that the right is limited to protection against fees imposed for public use of highways).

The Ninth Circuit then rejected each of the government's arguments. First, the court dismissed the government's attempt to limit *Cree II* to its facts and to hold that the Treaty only preempted fees. Relying on the factual findings and analysis in *Cree II*, the court instead held that the Treaty preempts *any* "restriction" or "condition" on travel, not merely fees. *Smiskin*, 487 F.3d at 1266. Next, the court expressly rejected the government's attempt to draw "an arbitrary line between travel and trade" in the context of transporting goods to market. *Id.* The court continued:

> We have already established that the Right to Travel provision "guarantee[s] the Yakamas the right to transport goods to *market*" for "*trade* and other purposes." Thus, whether the goods at issue are timber or tobacco products, the right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent. *See Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 397 (1968) ("To construe the treaty as giving the Indians no rights but such as they would have without the treaty would be an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.").

Smiskin, 487 F.3d at 1266-67 (internal quotations and citations omitted, alterations in original). The court held that the pre-notification requirement, like the fee-based requirements discussed in the *Cree* cases, violated the Right to Travel and affirmed the district court's order dismissing the charges against the Smiskins. *Id.* at 1271.

The Ninth Circuit expressly affirmed this holding in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There, the Ninth Circuit considered Revised Code of Washington chapter 70.157 (2013), an escrow statute created to offset smoking-related healthcare costs. A Master Settlement Agreement required participating manufacturers to make payments, in

perpetuity, to offset smoking tobacco's impact on the healthcare system. Washington's statute required any non-participating manufacturers to make a flat-fee payment into escrow for each qualifying unit of tobacco sold. Wash. Rev. Code § 70.157.020(b)(1). King Mountain Tobacco, which was owned and operated by an enrolled member of the Yakama Nation and which grew some of its tobacco on the Yakama Reservation, did not participate in the Master Settlement Agreement. It filed an action for declaratory and injunctive relief, arguing that the Right to Travel preempted the statutory escrow requirement because it enjoyed an unfettered right to trade. *King Mountain Tobacco*, 768 F.3d at 990-91.

The Ninth Circuit disagreed, distinguishing the Right to Travel, including travel "for the purpose of bringing goods to market" at issue in *Cree II* and *Smiskin*, from the unfettered right to trade asserted by King Mountain Tobacco.

The court began by expressly reaffirming the holdings in *Cree II* and *Smiskin*. *Id.* at 997-98. The court acknowledged the factual findings in *Yakama Indian Nation* and its holding in *Cree II*, which "reasoned that the Treaty was evidence of the importance of the Right to Travel to the Yakamas and concluded that 'the Treaty must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" *Id.* at 997 (quoting *Cree II*, 157 F.3d at 769) (citations omitted). Addressing *Smiskin*, the court reiterated

that "'[a]pplying [the notice] requirement to the Yakamas imposes a condition on travel that violates *their treaty right to transport goods to market without restriction.*'" *Id.* at 998 (quoting *Smiskin*, 487 F.3d at 1266).

However, the court emphasized that the escrow statute in *King Mountain Tobacco* did not restrict or place conditions on travel. Rather, the condition or restriction imposed by the escrow statute was a mandatory flat-fee payment for every unit of tobacco sold. *Id.* at 991-92; Wash. Rev. Code § 70.157.020(b)(1). Accordingly, the Ninth Circuit held that the restriction did not and could not burden travel in any way, and was therefore not preempted by the Treaty. *Id.* at 998.

The Ninth Circuit's decisions addressing the Treaty Right to Travel are clear and consistent: the Treaty preempts state laws that restrict or place conditions on (1) travel (*Cree II*), (2) travel encompassing trade, i.e., "bringing goods to market" (*Smiskin*), but not (3) encumbrances on the sale of goods, i.e., "trade" (*King Mountain Tobacco*).

2. The Washington Supreme Court Properly Found That the State Import Tax Impermissibly Burdened the Yakamas' Right to Bring Goods to Market

Working within the framework set forth by the Ninth Circuit, the Washington Supreme Court in the case below concluded that Washington's fuel import

tax was analogous to the restriction on bringing goods to market addressed in *Smiskin* and accordingly held that the Treaty preempted the tax.

The court recognized the distinction between pure trade and the Right to Travel – and "bring goods to market" – that the Ninth Circuit addressed in *King Mountain Tobacco*, and it adhered to that distinction. The state high court focused on the nature of the burden placed on the Yakamas by the state law at issue. *Accord Cree II*, 157 F.3d at 773 ("[t]he proper focus, however, is on the type of tax at issue"). Focusing on the nature of the Department's import tax, the state court quickly recognized and dismissed the Department's analogy to the *King Mountain Tobacco* decision. *See* Pet. App. 13a (holding that unlike *Smiskin*, the regulation at issue in *King Mountain Tobacco* had nothing to do with travel).

The Washington Supreme Court recognized that the tax in Assessment 756M was assessed the moment that Cougar Den's trucks carrying fuel to sell on reservation crossed the border into Washington State. Pet. App. 2a, 13a-14a. As in *Smiskin*, "the [burdening] requirement was triggered by the transportation of [goods] into the state." *Id.* at 14a. The Washington Supreme Court plainly adhered to *Smiskin* and *King Mountain Tobacco*, holding that Washington's import tax was "a condition on travel that affected the Yakamas' treaty right to transport

goods to market without restriction."[6] *Id.* at 13a. Therefore, the Department cannot tax Cougar Den for transporting fuel through Washington, from Oregon on U.S. Highway 97, to market on the Yakama Nation Reservation.

Nonetheless, the Department reiterates this argument here, doubling down on its belief that travel was at issue in *King Mountain Tobacco* because "'King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in North Carolina where more tobacco is purchased and blended with reservation tobacco.'" Petition at 23 (quoting *King Mountain Tobacco*, 768 F.3d at 994). But those facts are irrelevant because the burden on the tribal member in *King Mountain Tobacco* – the escrow fee imposed on the sale of tobacco – had nothing to do with travel. *See King Mountain Tobacco*, 768 F.3d at 991-92 (describing Washington's escrow fee, Wash. Rev. Code chapter 70.157, as requiring a flat-fee payment for every unit of tobacco sold, before holding that the escrow fee did not burden the Right to Travel).

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[6] The Department also relies on *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002). But in *Ramsey*, the Ninth Circuit expressly distinguished the *Cree II* line of cases on the grounds that a different standard applied to federal tax exemptions. 302 F.3d at 1078 (holding that "*Cree II* analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation."). "The different standards stem from the state and federal government's distinct relationship with Indian tribes," further noting that "[t]he federal government has plenary and exclusive power to deal with tribes." *Id.* *Ramsey* is plainly irrelevant here, as this case turns on the meaning of a state tax.

Under any fair reading of the cases, the Washington Supreme Court decision below is in complete harmony with both *Smiskin* and *King Mountain Tobacco*. It is unfortunate that the State has resorted to mischaracterizing these basic holdings in an effort portray a conflict that does not exist.

B. The Washington Supreme Court's Holding Does Not Conflict with any Decision of This Court

The Department also represents that the decision below conflicts with various decisions of this Court. Neither of the Department's arguments in support of this contention are sustainable.

The Department's first argument, that the Washington Supreme Court "defied this Court's fundamental rule that state taxes and regulations apply to Indians outside reservation boundaries absent an express federal law," merits little discussion. There is no doubt that the Washington Supreme Court recognized this rule: the question presented was whether the 1855 Treaty was such an "express federal law" and the court held that it was. Pet. App. 4a-5a. This purported argument in favor of certiorari is merely the Department's disagreement with the Washington Supreme Court's conclusion.

Nor can the Department show that the Washington Supreme Court reached this conclusion by misapplying this Court's rules of treaty construction. Indeed,

the Department advocates for a plain meaning construction of the Treaty, an interpretation that is ignorant of the history of the negotiation of the Treaty and how the Treaty would have been understood by the Yakamas at the time.

This Court employs well-settled principles in construing treaties between the United States and a tribe. Owing to the "'unique trust relationship between the United States and the Indians,'" these principles of construction include a historical analysis. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). Contrary to the Department's argument, "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* Rather,

> [i]t is [the Court's] responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. State of Wash., 315 U.S. 681, 684-85 (1942); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 n.17 (1978) ("[i]n interpreting Indian treaties and statutes, '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'") (second alteration in original, internal

quotations omitted) (quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)).

This Court "has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *Blackfeet*, 471 U.S. at 766; *see also State v. Buchanan*, 138 Wash. 2d 186, 201-02, 978 P.2d 1070 (1999) (analysis of parties' intention "begins with the language of the treaty and the context in which the written words are used"); *Yakama Indian Nation*, 955 F. Supp. at 1235-36.

This Court has applied these rules of construction to Article III of the 1855 Treaty: "This rule, in fact has thrice been explicitly relied on by the Court in broadly construing these very treaties in the Indian's favor." *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979). More recently (and as discussed above), the Ninth Circuit has confirmed that a historical inquiry is necessary whenever the Right to Travel under Article III of the Yakama Treaty is at issue:

> We had previously found ambiguity in Article III's right to travel, and required application of the Indian canon of construction to clarify the extent of that right. . . . But the right to travel is express in Article III of the Yakama Treaty, and the *Cree* cases involved the right to travel (driving trucks on public roads) for the purpose of transporting goods to market.

> In *Smiskin*, we rejected the government's argument that the right to travel did not apply when the Yakama were engaged in commerce. 487 F.3d at 1266-67 ("[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate our decision in *Cree II* and render the Right to Travel provision truly impotent."). These cases clarified the extent of the right to travel found in Article III of the Yakama Treaty.
>
> But there is no right to trade in the Yakama Treaty.

King Mountain Tobacco, 768 F.3d at 998.

There is no question that this Court's principles of treaty interpretation do not permit courts to ignore treaty language that, viewed in its historical context and given a fair appraisal, would run counter to the tribe's claims. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); Petition at 26-27. But the Department's rhetoric on this point is overblown: there is also no doubt that a historical inquiry is essential when evaluating the rights reserved under this Treaty. The Department's naked "plain language" inquiry ignores the historical context mandated by this Court.

The Washington Supreme Court's decision examines the Treaty language along with the historical context of that language within the Treaty. This is the approach mandated by this Court and employed by the

Ninth Circuit in each of its decisions addressing the Treaty language. There is no conflict meriting certiorari.

C. The Holding Below Is Correct

Given the absence of any cognizable conflict between the Washington Supreme Court's decision and the decision of any other court, the Department's Petition is one for error correction. That is, of course, not normally the stuff of certiorari, and even if it were, there is no error here.

The Washington Supreme Court quickly recognized that this case turned on (1) the meaning of the "Right to Travel" language in the Treaty and (2) the nature of the restriction or condition imposed by Washington State's import tax. *Accord Cree II*, 157 F.3d at 773 ("[t]he proper focus [] is on the type of tax at issue"). The decision fits squarely within this Court's decisions on treaty construction generally, as well as with this Court's and the Ninth Circuit's decisions interpreting this specific Treaty.

1. The Washington Supreme Court Properly Relied on the Factual Record Addressing the Historical Meaning of the Right to Travel Developed in *Yakama Indian Nation*

To interpret the meaning of the "Right to Travel" language in the Treaty, the state court turned to the factual record and legal conclusions developed in

Yakama Indian Nation. *See* Pet. App. 6a-9a. The court emphasized the findings that:

> The treaty and right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreation, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes.

Id. at 7a (citing *Yakama Indian Nation*, 955 F. Supp. at 1239). The court further highlighted findings that (1) the agents of the United States "repeatedly emphasized in negotiations that tribal members would retain the 'same liberties . . . *to go on the roads to market*'" and (2) that "'both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, *with no conditions attached.*'" *Id.* at 7a-8a (quoting *Yakama Indian Nation*, 955 F. Supp. at 1244, 1251) (first emphasis in original). The state court then noted that the Ninth Circuit expressly adopted these findings in *Cree II*, observing that "the treaty secured for the Yakamas the right to use future roads and to *trade* their goods." *Id.* at 9a (emphasis added).

The Washington Supreme Court then considered the Ninth Circuit's subsequent decisions in *Smiskin* and *King Mountain Tobacco*. Pet. App. 9a-12a. These

cases establish that the Treaty preempts state laws that restrict or place conditions on travel, to include travel for the purposes of trade (i.e., bringing goods to market), but not state laws restricting trade alone. *See King Mountain Tobacco*, 768 F.3d at 998.

The state court concluded that "[t]he Department taxes the importation of fuel, which is the transportation of fuel," Pet. App. 16a, and that "travel on public highways is directly at issue." The court analogized this case to the notice requirement at issue in *Smiskin* and distinguished the escrow fee assessed solely on the sale of goods in *King Mountain Tobacco*. *Id.* at 13a-14a. Thus, the court held that the Yakamas' right to transport goods to market permitted Cougar Den to import fuel from Oregon to the Yakama reservation on public highways, without the payment of fees. *Id.* at 16a.

This interpretation of the Treaty language is further supported by additional language in the Treaty and this Court's holding addressing the analogous fishing clause in this same treaty. *See Cree II*, 157 F.3d at 771 ("The district court's interpretation of the term 'in common with' is consistent with the Supreme Court's interpretation of that term in the fishing rights cases.") (quoting *Tulee v. State of Wash.*, 315 U.S. 681, 684 (1942) ("'Article III conferred upon the Yakamas continuing rights, *beyond those which other citizens may enjoy*'") (emphasis in original)). These cases reject the oft-asserted proposition that the Treaty language should be interpreted to place the Yakamas "on equal footing" with non-Indians:

> The fishing clause speaks of "securing" certain fishing rights, a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised. Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters. Moreover, the phrasing of the clause quite clearly avoids placing each individual Indian on an equal footing with each individual citizen of the State.

Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (internal citations omitted).

2. The Department Seeks Certiorari Because It Disagrees with the Washington Supreme Court's Construction of Washington's Fuel Taxation Statutes

The Department does not meaningfully disagree with either the Washington Supreme Court's or Cougar Den's understanding of *Cree*, *Smiskin*, or *King Mountain Tobacco*. *See* Petition at 14 (treaty preempts taxes and requirements aimed at travel, but "does not preempt other charges, taxes, or regulations directed at the goods themselves").

Nor has the Department disputed the historical findings of the federal court in *Yakama Indian Nation*, 955 F. Supp. at 1237-38, though the Department itself was a party to that case in 1997 and presented evidence in support of its narrow reading of the Right to Travel language. *See id.* Those historical findings were the basis of *Cree II*, *Smiskin*, and *King Mountain Tobacco*. Here, the Department disagrees only with the state court's conclusion that the state-imposed restrictions at issue are more analogous to *Smiskin* than to *King Mountain Tobacco*. Yet to get there, the Department asks this Court to review the Washington Supreme Court's interpretation of Washington state statutes, Wash Rev. Code §§ 82.36.020(2) & 82.38.030(7), to determine whether Washington's fuel "import" tax is a tax on "bringing goods to market" or a tax directed at the goods themselves, similar to the escrow fee at issue in *King Mountain Tobacco*. This question of state law does not merit this Court's review.

The Washington Supreme Court has addressed and rejected the Department's arguments that the import taxes assessed under Revised Code of Washington sections 82.36.020(2) and 82.38.030(7) are "not incident to use of or travel on the roads or highways," but rather are "assessed based on incidents of ownership or possession of fuel." Pet. App. 12a-13a ("[the Department] argues that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway."). The court's holding, that the "importation of fuel" is "the transportation of fuel," is supported by

the plain language of the import statute and consistent with Washington's well-established principles of statutory construction.

Washington's fuel tax statutes define "import" as "to bring . . . fuel into [the] state," other than through a "pipeline or vessel," and subject to other exceptions. Former Wash. Rev. Code §§ 82.36.010(10) & 82.38.020(12). Fuel located in "the fuel supply tank of a motor vehicle" is exempt, as is wholesale fuel that passes through Washington to another out-of-state market, such as Idaho. *Id.* "Bring," the operative verb in the definition, is a transitive verb meaning "to take or carry someone or something to a place or a person." Further, the tax is levied "at the time and place of the first taxable event and upon the first taxable person within [Washington]." Former Wash. Rev. Code §§ 82.36.022 & 82.38.031. Taken together, these provisions make clear that the state of Washington taxes the transportation of fuel into Washington for the purpose of sale in Washington.

Moreover, it is undisputed that the Department issued Assessment 756M and all subsequent assessments against Cougar Den because Cougar Den transported fuel into the Yakama Reservation. The tax was imposed when Cougar Den "imported" – that is, brought fuel across the state border – en route to its market on the Yakama Reservation. The Washington Supreme Court properly analogized the effect of this statute to the notification-based restriction at issue in *Smiskin*. Pet. App. 13a-14a.

D. The Department's Inflated Claims of Harm Do Not Merit Certiorari

Finally, the Department's revenue concerns are overstated and an inappropriate basis for certiorari. It would of course be premature to construe the Washington Supreme Court's decision beyond its facts.

Moreover, there are only two other tribes which were granted similar "Right to Travel" language in their treaties. One tribe is located within Idaho, and another is located within Montana. And while the state of Idaho has sought to be heard via an amicus brief in this matter, the state of Montana has not. Nor has the state of Oregon, the state where Cougar Den lawfully purchased the fuel at issue. Washington State's concern is evidently not uniformly shared.

It is well settled that the Department cannot abrogate the Yakama Nation's rights merely so that the Department might "pursu[e] the most efficient remedy" to enforce valid fuel taxes on Washington drivers. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). If Washington State wishes to lawfully tax fuel consumption by non-Indians, without placing the incidence of the tax on tribal retailers selling on reservation or otherwise violating treaty rights, it has adequate resources to do so and can amend its statutes accordingly, as it has done in the past. Unless and until Congress amends the treaty promises at issue here, the Department must abide by them.

CONCLUSION

The Washington Supreme Court's holding is squarely within the bounds of the Ninth Circuit's decisions regarding the Treaty and the Department fails to identify a conflict with any decision of this Court. The Department's Petition for Certiorari should be denied.

DATED this 16th day of August, 2017.

Respectfully submitted,

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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LICENSING

IN THE MATTER OF: COUGAR DEN INC. RESPONDENT	OAH Docket No. 2014-DOL-0006 Agency No. 756M INITIAL ORDER. (Filed Jul. 24, 2014)

A telephone hearing in the above-entitled matter was conducted on May 24, 2014, before Stephen K. Leavell, Administrative Law Judge, at the Office of Administrative Hearings in Yakama Washington. Cougar Den, Inc., respondent was represented by Andre Penalver Attorney. Fronda Woods, Senior Counsel with the Attorney General of the state of Washington, appeared and represented the Department of Licensing (department)

EXHIBITS

The parties agreed to the stipulated facts 1-18 and the exhibits 1-9.

ISSUE

Both parties have moved for summary judgment based on the stipulated facts.

RESULT

The respondent's motion for Summary Judgment is granted and the department's motion is denied.

FINDINGS OF FACT

The parties stipulated to the following findings of fact:

1. The Confederated Tribes and Bands of the Yakama Nation (referred to in this proceeding as "Yakama Nation"), is a federally recognized Indian tribe.

2. The Yakama Reservation was established by the Yakama treaty of June 9, 1855, 12 Stat. 951. Its boundaries are described in the Article II of the Treaty. The ceded lands of the Yakama Nation are described in Article I of the Treaty.

3. In entering into the Treaty of 1855 the Yakama nation ceded land ("the Ceded Area") to the United States. A map of the ceded lands is maintained by the Yakama nation.

4. The Yakama nation is a governmental authority that exercise jurisdiction within the Yakama Indian Reservation.

5. Richard "Kip" Ramsey is an enrolled member of the Yakama Nation.

6. Kip Ramsey is the owner and president of the Respondent Cougar Den, Inc.

7. Cougar Den, Inc. is a private Yakama Indian-owned company incorporated under the laws of the Yakama Nation. The business office of Cougar Den, Inc. is located within the Yakama Reservation. Cougar Den, Inc. is registered as a foreign corporation with the Washington Secretary of State.

8. On September 29, 1993, the secretary of the Yakama tribal Council issued a document to Cougar Den Inc. entitled "petroleum products license responsibilities." Yakama tribal Council revoked the document on October 2, 2013.

9. Since February 2012 Cougar Den, Inc. has held a motor vehicle fuel dealers license issued by the State of Oregon.

10. In June 2012 and May 2013 Cougar Den, Inc. was issued a Bulk User Petroleum Permit by the Yakama Nation.

11. Cougar Den, Inc. has never applied for held any type of motor vehicle fuel license or special license issued by the State of Washington.

12. In March 2013 Cougar Den, Inc. began exporting fuel (gasoline) and special fuel (diesel fuel) from Oregon to locations within the Yakama Reservation. Cougar Den Inc. filed reports with the Oregon Department of Transportation, Fuels Tax Group, showing the number of gallons exported. The following table shows the number of gallons that Cougar Den Inc. exported from Oregon to the Yakama Reservation

between March 2013 and October 2013 as reported to the Oregon Department of Transportation.

Month	Motor Vehicle Fuel (Gasoline) (gallons)	Special Fuel (Diesel Fuel) (gallons)
March 2013	18,501	23,157
April 2013	304,199	163,344
May 2013	320,652	195,661
June 2013	529,753	321,623
July 2013	537,547	295,101
August 2013	602,136	320,669
September 2013	540,516	360,579
October 2013	596,464	351,606

13. The trucks that transported the petroleum products described in the above table from Oregon to Yakama Indian Reservation remained at all times in the state of Oregon, the ceded area of the Yakama Nation, or the Yakama Reservation. The trucks left Interstate 84 at Biggs Junction Oregon, and took US Highway 97 from there to the Yakama Reservation.

14. Cougar Den Inc. did not pay Washington fuel taxes on the fuel described in the above table.

15. On December 9, 2013 the Washington Department of licensing issued Assessment Number 756M to Cougar Den Inc. Assessment Number 756M

described taxes, penalty, and interest the Department asserted were then owed to the state of Washington with respect to the fuel shown in the above table.

16. The respondent made a timely appeal of the assessment 756M letter of appeal dated January 3, 2014 sent to the department.

17. The department referred the appeal to the Office of Administrative Hearings. On February 24, 2014 Administrative Law Judge Stephen K. Leavell issued a notice of prehearing conference. Administrative Law Judge Robert Boggs conducted a prehearing conference on March 11, 2014 and Administrative Law Judge Stephen K. Leavell issued a notice of hearing and prehearing conference order on March 12, 2014.

18. On March 31, 2014 the Department filed a motion to correct the caption to delete Kip Ramsey as a Respondent, leaving Cougar Den, Inc. as the sole respondent.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to Revised Code of Washington(RCW) 34.05 and chapter 10-08 Washington Administrative Code (WAC).CW) 34.05 and chapter 10-08 Washington Administrative Code (WAC).

2. The Department bases their ability to tax on RCW 82.23A.020. Subsection 1 which states that "for all other cases, the wholesale value is determined upon the first bulk possession in the state." The Department

contends that when the respondent purchased the bulk fuel in the state of Oregon and transported the fuel into the state of Washington that they were obligated to pay the tax. The department asserts that the respondent imported fuel into the state of Washington and failed to pay the taxes as required by state law.

3. The respondent argued that they are exempt from the tax as a result of their standing as a licensed hauler of bulk fuel by the Yakama Nation. The respondent relies upon the 1855 Treaty with the Yakama Nation. The fuel was transported from the state of Oregon across ceded lands, Yakama Nation lands and delivered to Yakama owned businesses on the Yakama Reservation. The respondent argued that based on case law they are exempt from paying the state fuel tax.

4. The courts have held that the 1855 Treaty with the Yakama Nation (Treaty) is considered a "sacred" and "founding" document by the Yakama Nation. The language of Article III of the Treaty provides that "necessary for the public conveyance, roads may be run through the said reservation: and on the other hand, the right-of-way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States to travel upon all public highways."

5. The history of the treaty is such that the Yakamas were provided the right to travel on the roads outside of the reservation to go to market. The Yakamas had a history of moving goods back and forth

between the coast and the interior and obtain access to goods from the plains. The treaty included language acknowledging the history of the Yakamas and trading in those regions. The treaty was written in such a way to protect the Yakamas rights to trade.

6. Cougar Den, Inc. assessed both federal taxes and Yakama Nation taxes with respect to the fuel hauled and delivered to businesses on the Yakama reservation. The respondent hauled fuel from Oregon to the reservation from March 2013 through October 2013.

7. The respondent relies upon two primary cases, the first being United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007) and the second Cree v. Flores, 157 F.3d 762 (9th Cir. 1998).

8. In Smiskin two Yakama members were arrested for transporting unstamped cigarettes in violation of state law. The court held that cigarette stamps are meant to enforce collection of a cigarette tax. The court held that the Treaty bars any restriction or condition on the right to travel and that the stamps at issue "are a pre-notification requirement that is a restriction in violation of the Treaty." The court held that the stamp which is in effect a tax acts as a restriction on the travel of members of the Yakama Nation. The Treaty is interpreted to allow unfettered access for members of the Yakama Nation to travel for the purpose carrying on trade.

9. In the Cree case the state sought to impose licensing requirements and fees on trucks owned by

members of the Yakama nation that operated logging trucks that hauled logs from the reservation to mills outside the reservation. The Ninth Circuit rejected the states argument and held that the Treaty must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.

10. The Department seeks to limit the application of the Cree case to licensing of vehicles owned by members of the Yakama Nation. The principle of both Smiskin and Cree is that the state cannot restrict travel for purposes of trade to members of the Yakama Nation either by charging a tax or requiring state licenses on member vehicles.

11. The Department characterized the respondent's actions as attempting to evade Washington taxes. The Department also stated that the Treaty does not preempt Washington fuel tax laws. The Department interpreted the Cree case narrowly. The Department characterized the Cree case as involving the licensing of trucks operating on state highways. The Department argued that the fuel tax laws did not restrict use of public highways or impose a fee for such use. The Department stated that the state is regulating the fuel business. The state requires a license and imposes the tax on fuel products at a particular point in the distribution chain when the fuel enters the state regardless of the means of entry.

12. The Department believes the Smiskin case holds that the government cannot impose criminal

sanctions on Yakama tribal members for failing to notify the state before transporting untaxed cigarettes. The Department argued that present case is not about the regulation of the transportation of a product but the regulation of the fuel business by requiring license and imposing a tax on fuel at a particular point in the distribution chain.

13. The Department relied upon the statutory authority in RCW 82.36.020 Tax levied and imposed

> (2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:
>
> (c) Motor vehicle fuel enters into this state if either of the following applies:
>
> (i) The entry is by bulk transfer and the importer is not a licensee; or
>
> (ii) The entry is not by bulk transfer;

And; RCW 82.38.030 Tax imposed – Rate – Incidence – Allocation of proceeds – Expiration of subsection

> (7) Taxes are imposed when:
>
> (c) Special fuel enters into this state for sale, consumption, use, or storage, unless the fuel enters this state for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320, if either of the following applies:
>
> (i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

14. The State's tax is imposed at the time of bulk transfer or at the time the special fuel enters the state. The issue in this case does not challenge the general application of the taxing authority but whether the state has the authority to impose the tax on the importation of the fuel from the state of Oregon to distribution on the Yakama Nation to businesses operating on the Yakama nation.

15. The Department acknowledged that a bulk supplier transporting fuel through the state of Washington to another state would not be subject to the fuel tax. The example was given of a purchase of bulk fuel in Oregon destined for Idaho and being hauled through the state of Washington. The Department pointed to an exemption made in the RCW. The statutory exemption is an acknowledgement of the state's inability under the U.S. Constitution's commerce clause, to impose a tax that interferes with interstate commerce.

16. RCW 82.36.230 "The provisions of this chapter requiring the payment of taxes do not apply to motor vehicle fuel imported into the state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce."

17. The United States Constitution Article One Section 8 provides that "The Congress shall have Power [. . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

18. The Smiskin case at page 769 "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."

19. It is clear that the courts have held that the Yakama Nation have rights reserved to them by the 1855 treaty which have been interpreted as the right to travel on the state highways and engage in commerce. The Smiskin court held the requirement that members of the Yakama nation could not travel from Idaho to the Yakama nation without affixing the state's tax stamps was a restriction on their rights established in the 1855 treaty.

20. The Department seeks to characterize this case as not restricting the travel of the respondent but that by bringing bulk fuel into the state they are subject to the states taxing authority. This case is very similar to the Smiskin case. The Department seeks to require a tax on goods purchased outside the state of Washington being transported to the Yakama Reservation by members of the Yakama Nation. The court in Smiskin held that the tax stamp was a pretax and could not be required by members of the Yakama Nation to be affixed to cigarettes being transported from Idaho to the Yakama Reservation. In the same manner the Department cannot require the payment of a tax on fuel purchased in Oregon and being transported to

the Yakama Reservation my members of the Yakama Nation.

21. The state provides in RCW 82.36.230 that the payment of the tax does not apply to motor vehicle fuel imported in to the state in interstate commerce. The issue then is whether the respondent's importation of fuel from Oregon is either interstate commerce and excluded from the tax, or is protected by the 1855 Treaty and not subject to the tax.

22. The Department argued that once the fuel entered the state of Washington from Oregon the condition of the RCW is met and the Respondent imported the fuel into the state and is subject to the tax. However the statute specifically exempts haulers who are passing through the state with a final destination outside of Washington. The Respondent hauled the fuel into Washington with a final destination on the Yakama Nation.

23. The Supreme Court held; "We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country. Oklahoma Tax Commission v Chickasaw Nation 515 U.S. 450 (1995), 115 S.Ct. 2214, 123 L.Ed.2D 400, 63 USLW 4594

24. Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-334, that "no Territory or State shall ever have a

right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants." To this treaty language, the Tenth Circuit applied "the general rule that '[d]oubtful expressions are to be resolved in favor of' the Indians." 31 F.3d, at 978 (quoting McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973)). The Court of Appeals also noted that it had endeavored to "rea[d] the treaty as the Indians [who signed it] would have understood it." 31 F.3d, at 979. Oklahoma Tax Commission v Chickasaw Nation 515 U.S. 450 (1995), 115 S.Ct. 2214, 123 L.Ed.2D 400, 63 USLW 4594

25. The courts have held that the treaties with the Indian Nations should be resolved in favor of the Indians and the treaty and should read as the Indians [who signed it] would have understood it. In both of these constructs the 1855 Treaty with the Yakama Nation provides for the unimpeded right to travel upon state roads and highways without interference from the state. This has been upheld in numerous cases including the Smiskin case and the Cree and Flores cases. The member of the Yakama Nation doing business as Cougar Den, Inc. was exercising that right by purchasing bulk fuel in Oregon and transporting on state highways until they arrived at the Yakama Nation. State Highway 97 from the Oregon border at the Columbia River is on ceded land. The effect of that on this case is not addressed.

26. When a member of the Yakama Nation purchases products outside of the Yakama Nation they are not exempt from the sales tax imposed by the State. In

this case the Respondent purchased the product in Oregon, not in Washington. The final destination of the bulk fuel was for distribution to business entities operating on the Yakama Nation. The state of Washington is without authority to tax the bulk fuel simply because it was transported across the state highways. The history of the Yakama Nation and Treaty was understood to allow members of the tribe to freely travel and trade free from the interference from the State. The State cannot now seek to change that right without Federal legislative authority. Only the Federal government can alter the relationship by treaty or statute, not the state Department of Licensing.

27. The Department has not shown that the fuel was destined to be sold to non-Indians. The state can require the tribal business to collect the tax from non-Indians. That is not the case here and was not addressed. Under the present taxing scheme the Respondent is not required to pay the excise tax.

ORDER

The Respondent's motion for Summary Judgment is GRANTED

The Department's motion for Summary Judgment is DENIED

Issued from Tacoma, Washington, on the date of mailing.

/s/ Stephen Leavell
Stephen Leavell
Administrative Law Judge
Office of
Administrative Hearings

APPEAL RIGHTS.

Under RCW 34.05.464 and WAC 10-08-211, any party to this proceeding may file a petition for review of this initial order. The petition must be filed with the Director of Licensing, P.O. Box 9020, Olympia, WA 98504-9020 within twenty (20) days from the date this initial order was mailed to the parties. A copy of the petition for review must be sent to all parties of record. A petition for review must specify the portions of the initial order with which the party disagrees, and must refer to the evidence in the record which supports the party's position. Any party to this proceeding may file a reply to a petition for review. The reply must be filed with the Director of Licensing at the address above within ten (10) days from the date the petition for review was mailed.

CERTIFICATE OF MAILING IS ATTACHED

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 2014-DOL-0006

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Kip Ramsey President Cougar Den, Inc. 620 Signal Peak Rd PO Box 669 White Swan, WA 98952 *Respondent*	☒ First Class Mail, Postage Prepaid ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Andre M. Penalver Attorney at Law Stokes Lawrence Velikanje Moore & Shore 120 N Naches Ave Yakima, WA 98901-2757 Fax: (509) 895-0060 *Respondent Representative*	☒ First Class Mail, Postage Prepaid ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail
Fronda C. Woods Senior Counsel Office of the Attorney General 1125 Washington St SE PO Box 40110 Olympia, WA 98504-0110 Fax: (360) 664-0174 *Agency Representative*	☒ First Class Mail, Postage Prepaid ☐ Certified Mail, Return Receipt ☐ Hand Delivery via Messenger ☐ Campus Mail ☐ Facsimile ☐ E-mail

Date: Thursday, July 24, 2014

OFFICE OF
ADMINISTRATIVE
HEARINGS

/s/ Bailee N. Roby
Bailee N. Roby
Legal Secretary

WASHINGTON REVISED CODE CHAPTER 82.36 – MOTOR VEHICLE FUEL TAX

RCW 82.36.010 Definitions. (Effective until July 1, 2015.)

. . .

(10) "Import" means to bring motor vehicle fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

. . .

RCW 82.36.020 Tax levied and imposed – Rate to be computed – Incidence – Distribution. (Effective until July 1, 2015.)

(1) There is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate computed in the manner provided in RCW 82.36.025 on each gallon of motor vehicle fuel.

(2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:

(a) Motor vehicle fuel is removed in this state from a terminal if the motor vehicle fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;

(b) Motor vehicle fuel is removed in this state from a refinery if either of the following applies:

(i) The removal is by bulk transfer and the refiner or the owner of the motor vehicle fuel immediately before the removal is not a licensee; or

(ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;

(c) Motor vehicle fuel enters into this state if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

(d) Motor vehicle fuel is sold or removed in this state to an unlicensed entity unless there was a prior taxable removal, entry, or sale of the motor vehicle fuel;

(e) Blended motor vehicle fuel is removed or sold in this state by the blender of the fuel. The number of gallons of blended motor vehicle fuel subject to the tax is the difference between the total number of gallons of blended motor vehicle fuel removed or sold and the number of gallons of previously taxed motor vehicle fuel used to produce the blended motor vehicle fuel;

(f) Motor vehicle fuel is sold by a licensed motor vehicle fuel supplier to a motor vehicle fuel distributor, motor vehicle fuel importer, motor vehicle fuel blender, or international fuel tax agreement licensee and the motor vehicle fuel is not removed from the bulk transfer-terminal system.

(3) The proceeds of the motor vehicle fuel excise tax shall be distributed as provided in RCW 46.68.090.

RCW 82.36.022 Tax imposed – Intent. (Effective until July 1, 2015.)

It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by RCW 82.36.020 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

WASHINGTON REVISED CODE CHAPTER 82.38 – SPECIAL FUEL TAX ACT

RCW 82.38.020 Definitions. (Effective until July 1, 2015.)

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

. . .

(12) "Import" means to bring special fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

. . .

RCW 82.38.030 Tax imposed – Rate – Incidence – Allocation of proceeds – Expiration of subsection. (Effective until July 1, 2015.)

. . .

(7) Taxes are imposed when:

(a) Special fuel is removed in this state from a terminal if the special fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is by a special fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(b) Special fuel is removed in this state from a refinery if either of the following applies:

(i) The removal is by bulk transfer and the refiner or the owner of the special fuel immediately before the removal is not a licensee; or

(ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is to a special fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(c) Special fuel enters into this state for sale, consumption, use, or storage, unless the fuel enters this state for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320, if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

(d) Special fuel is sold or removed in this state to an unlicensed entity unless there was a prior taxable removal, entry, or sale of the special fuel;

(e) Blended special fuel is removed or sold in this state by the blender of the fuel. The number of gallons of blended special fuel subject to tax is the difference between the total number of gallons of blended special fuel removed or sold and the number of gallons of previously taxed special fuel used to produce the blended special fuel;

(f) Dyed special fuel is used on a highway, as authorized by the internal revenue code, unless the use is exempt from the special fuel tax;

(g) Dyed special fuel is held for sale, sold, used, or is intended to be used in violation of this chapter;

(h) Special fuel purchased by an international fuel tax agreement licensee under RCW 82.38.320 is used on a highway; and

(i) Special fuel is sold by a licensed special fuel supplier to a special fuel distributor, special fuel importer, or special fuel blender and the special fuel is not removed from the bulk transfer-terminal system.

RCW 82.38.031 Tax imposed – Intent.

It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by RCW 82.38.030 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

RECORD
AND 1
BRIEFS

No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondent Cougar Den seeks to obscure the facts of this case, the conflict at its core, and its importance. Its efforts fail.

Cougar Den hires a non-Indian contractor to bring millions of gallons of fuel into Washington, where Cougar Den sells the fuel to Yakama-owned gas stations, which sell the never-taxed fuel to the public. The Washington Supreme Court held that the State cannot apply its wholesale fuel tax to Cougar Den because the Yakama Nation's treaty right "to travel upon all public highways" means that the State cannot tax "any trade, traveling, and importation that requires the use of public roads." Pet. App. 16a. By contrast, the Ninth Circuit has *never* held that the treaty exempts any goods from tax, instead holding that it creates no "right to trade" free from state taxation. And this Court has repeatedly held that non-discriminatory state taxes applied off-reservation, like the tax here, are valid absent express federal law to the contrary. The immediate cost of the Washington court ruling is tens of millions in lost tax revenue, and the long-term costs to Washington and other States will be vastly larger. The conflict is real, the case is important, and the Court should grant review.

ARGUMENT

A. The Washington Supreme Court's Decision Starkly Conflicts with the Ninth Circuit's Rulings

The Ninth Circuit has never held that "the right . . . to travel upon all public highways" in the Yakama Treaty preempts a tax on goods, like the one

at issue here. Indeed, it has explicitly rejected the idea that the treaty creates a "right to trade" free from state taxes. *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014), *cert. denied sub nom. Confederated Tribes & Bands of the Yakama Indian Nation v. McKenna*, 135 S. Ct. 1542 (2015). Here, however, the Washington court read the treaty to preempt the State's tax on wholesale fuel, declaring that "any trade, traveling, and importation that requires the use of public roads" is exempt from taxation. Pet. App. 16a. These rulings conflict.

In arguing to the contrary, Cougar Den asserts that the decision below is entirely consistent with the Ninth Circuit's decision in *King Mountain*, and compelled by the Ninth Circuit's decision in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). These arguments fail.

King Mountain is the Ninth Circuit's most recent case interpreting the Yakama Treaty and the only case, like this one, that dealt with a tax or fee on goods. Cougar Den argues that the decision below is consistent with *King Mountain* because "the burden on the tribal member in *King Mountain* . . . had nothing to do with travel," while this case involves travel. BIO 24. That argument is factually and legally untenable.

To begin with, this argument is inconsistent with the facts of *King Mountain* and the Yakama Nation's position in that case. *King Mountain* involved extensive travel by highway: King Mountain Tobacco used its trucks to transport tobacco from North Carolina to Washington and then delivered its cigarettes to stores in Washington and 16 other

states. *King Mountain Tobacco Co., Inc. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342, at *2, *7 (E.D. Wash. 2013), *aff'd*, 768 F.3d 989 (9th Cir. 2014). And the Yakama Nation argued extensively in *King Mountain* that the cigarette escrow fee at issue burdened the right to travel on highways in the same way that Cougar Den claims paying taxes on wholesale fuel burdens the right to travel. For example, the Tribe specifically argued that the escrow fee violated the "right to bring their goods to market without restrictions on their travel."[1]

Moreover, Cougar Den's characterization of the issue in *King Mountain* reinforces the existence of the conflict here, because its description applies equally to this case. Cougar Den argues that "the escrow statute in *King Mountain* did not restrict or place conditions on travel" because it "was a mandatory flat-fee payment for every unit of tobacco sold." BIO 22; BIO 24 (escrow fee "had nothing to do with travel" because it was a flat-fee). That is not a distinction because the same is true here. Washington's

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[1] Reply Br. (Dkt. Entry: 25 (2013 WL 6158628)), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 1; *see also* Opening Br. (Dkt. Entry: 10 (2013 WL 4077100)), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 23 (cigarette fee violated a "right to produce and sell products in the State of Washington and elsewhere, without the kinds of restrictions imposed by the Washington statutes"); *id.* at 24 (escrow fee violated the Tribe's "right to travel and trade outside the boundaries of the reservation free from state-imposed economic restrictions"); *id.* at 29-30 (cigarette escrow fees are "economic restrictions or pre-conditions on" trade over highways); *id.* at 32; Pet. for Reh'g En Banc (Dkt. Entry 36-1), *King Mountain Tobacco, Inc. v. McKenna*, No. 13-35360, at 2 (escrow charges violated a "right to transport goods to market without restriction"); *id.* at 15 (treaty "guarantees a broad right to trade that overlaps with the right to travel 'to transport goods to market without restriction'").

wholesale fuel tax is a "mandatory flat-fee payment for every unit of" fuel sold. Pet. App. 51a-52a (describing structure of Washington fuel tax laws). Cougar Den attempts to obscure this undisputed point by labeling the fuel tax here an "import tax." BIO 23. But Washington's wholesale fuel tax applies to fuel whether it is purchased in Washington or elsewhere. If the distributor obtains fuel at a bulk facility in Washington, the supplier has paid the tax; if a distributor obtains fuel outside of Washington, it owes the tax when it brings it into Washington. Pet. 5; Pet. App. 4a, 19a-22a; BIO App. 18-22. Cougar Den's decision to buy fuel outside of Washington and then bring it into Washington does not convert this into a tax on travel. The fuel would be taxed even if Cougar Den purchased it in Washington, and even if Cougar Den never transported the fuel on "the public highways," as the Washington Supreme Court acknowledged. Pet. App. 13a-14a (tax applies "regardless of whether Cougar Den uses the highway"). Thus, Cougar Den's claim that *King Mountain* involved "a mandatory flat-fee payment for every unit" sold not only fails to distinguish the Washington Supreme Court decision, it emphasizes the conflict. Just as the Ninth Circuit upheld the escrow fee there, it would have upheld the tax here.

Cougar Den also argues that *Smiskin* compels the result here because it establishes a rule that "the Treaty preempts state laws that restrict or place conditions on . . . 'bringing goods to market' (*Smiskin*)." BIO 22. But *Smiskin* establishes no such rule.

Smiskin held that the treaty exempted the Yakama from a state law requiring people to notify the State before transporting untaxed cigarettes. *Smiskin*, 487 F.3d at 1264, 1266. In doing so, the opinion incorporated broad language, first used by the district court in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), that the treaty assured the Yakama of the "right to transport goods to market without restriction." *Smiskin*, 487 F.3d at 1266. But that language has to be viewed in context. The district court used it in *Yakama Indian Nation* in evaluating state fees imposed for use of heavy trucks, i.e., "fees imposed *for use of* the public highways." *Yakama Indian Nation*, 955 F. Supp. at 1253 (emphasis added). In affirming that ruling, the Ninth Circuit explained that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Cree*, 157 F.3d at 769 (emphasis added). *Smiskin* similarly involved a restriction directly on the use of highways—a requirement to give the State advance notice. *Smiskin*, 487 F.3d at 1266; *King Mountain*, 768 F.3d at 998 (*Smiskin* concerns a notice "requirement" that "imposes a condition on travel.").

Here, it is undisputed that the wholesale fuel tax is not a tax *for the use* of the highway. Pet. App. 13a-14a (tax applies "regardless of whether Cougar Den uses the highway"). And the Ninth Circuit has never held or even implied that the phrase "right to transport goods to market without restriction" creates a right to avoid taxes on goods transported by highway, as the Washington court held here. Indeed,

the Ninth Circuit used this same language in *King Mountain* even as it upheld imposition of a State fee on goods transported by highway, emphasizing that the treaty contains no "right to trade" that preempts state taxes on goods. *King Mountain*, 768 F.3d at 998.

Thus, the actual holdings of the cases Cougar Den cites refute the broad rule it advocates. Moreover, Cougar Den's reading of the cases would have absurd consequences that the Ninth Circuit has never endorsed. For example, truck weight limits, speed limits, commercial driver's license laws, and a variety of other state laws "restrict or place conditions on . . . 'bringing goods to market.'" BIO 22. The Ninth Circuit has never held any such law preempted by the Yakama treaty.

The bottom line is that Cougar Den's attempts to harmonize the opinion below with Ninth Circuit precedent fail. Cougar Den claims the Ninth Circuit preempts "state laws that restrict or place conditions on . . . 'bringing goods to market'" but not "encumbrances on the sale of goods." BIO 22. That simply is not the Ninth Circuit rule. In the Ninth Circuit, only state laws that impose fees and other pre-conditions on Yakama members' travel on highways are preempted. *King Mountain*, 768 F.3d at 997-98; *Smiskin*, 487 F.3d at 1266; *Cree*, 157 F.3d at 769. State economic "encumbrances" on Yakama-owned goods that happen to be transported over highways while brought to market are not preempted. *King Mountain*, 768 F.3d at 997-98. The Washington Supreme Court's rule conflicts with the Ninth Circuit's because it exempts from taxation "*any trade*, traveling, and importation *that requires the use of*

public roads." Pet. App. 16a (emphases added). This Court should resolve this conflict.

B. The Washington Supreme Court Decision Conflicts with this Court's Rulings

The Washington Supreme Court's decision conflicts with two fundamental principles of this Court's Indian law jurisprudence: (1) that Indians are subject to nondiscriminatory state taxes and regulations outside a reservation absent express federal law to the contrary, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-50 (1973); and (2) that courts will not add to treaties rights that the parties never agreed upon, *e.g.*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). Cougar Den admits that these rules exist and apply, BIO 25, 28, but it offers no plausible explanation of how these principles can be reconciled with the opinion below. They cannot be.

Cougar Den claims that the first principle—the requirement of express federal law to preempt State taxes off-reservation—"merits little discussion" because the Washington Supreme Court found that the Yakama Treaty "was such an 'express federal law.'" BIO 25. This misses the point entirely.

The State has never disputed that the Yakama Treaty exists, or what it says. The question is whether its words expressly preempt application of this tax. The Washington court held that the Yakama's treaty "right . . . to travel upon all public highways" preempted application of this tax even though this tax

applies "regardless of whether Cougar Den uses the highway," and even though no Yakama traveled on the public highways in transporting this fuel (it was done by non-Indian contractors). Pet. App. 2a, 13a-14a, 40a. If this language amounts to an express law preempting application of this tax, then the rule has no meaning. Nearly any interpretation of any federal law or treaty would satisfy *Mescalero*, *Wagnon*, and a string of cases rejecting implied claims of preemption. Such an approach would undermine State authority and the very purpose of this Court's approach: to provide a "bright-line standard" "to ensure efficient tax administration" by States. *Wagnon*, 546 U.S. at 113; *see also Mescalero*, 411 U.S. at 156.

The conflict with this Court's decisions is especially stark because this Court has repeatedly emphasized that tribes and their members are subject to generally applicable off-reservation taxes "[a]bsent a '*definitely expressed*' exemption." *Mescalero*, 411 U.S. at 156 (emphasis added) (quoting *Choteau v. Burnet*, 283 U.S. 691, 696 (1931)); *id.* at 156 ("[T]ax exemptions are not granted by implication." (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943))); *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (tax exemptions must be "clearly expressed" (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988) ("[E]xemptions from taxation . . . must be unambiguously proved" (alterations in *Wells Fargo Bank*)))). Neither the Washington court nor Cougar Den offers any plausible explanation of how the Yakama's "right . . . to travel upon all public highways" unambiguously and expressly allows the Yakama to avoid this tax.

Turning to the second principle, Cougar Den argues that the Washington court simply applied the canon of construction that ambiguous treaty language is interpreted in a tribe's favor. BIO 25-28. But "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), *quoted in King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 995 (9th Cir. 2014) (alterations in *King Mountain*); *see also Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). Applying this principle, the Ninth Circuit observed that the Yakama Treaty reserved "the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *King Mountain*, 768 F.3d at 997; *see also Ramsey v. United States*, 302 F.3d 1074, 1080 (9th Cir. 2002) (holding "that the relevant Treaty provision contains no 'express exemptive language'" and rejecting claim that Yakama business was exempt from federal fuel taxes), *cert denied*, 540 U.S. 812 (2003). There is simply no plausible interpretation of a treaty right "to travel upon all public highways" that would preempt application of a tax on goods that applies "regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a.

In short, the Washington court's decision conflicts with this Court's decisions on foundational points of Indian law. The Court should address these conflicts.

C. The Question Presented is Important and is Cleanly Raised Here

Cougar Den seeks to downplay the importance and cert-worthiness of this case by obscuring the facts and misrepresenting the holding below. The Court should see through this effort.

Cougar Den first attempts to minimize its massive tax avoidance and confuse the issues by asserting that "its sales are to enrolled members of the Yakama Nation." BIO 5. This is misleading. The retail gas stations that Cougar Den supplies are owned by Yakama members. But it is undisputed that those stations sell the untaxed fuel to the general public in vast quantities. Pet. App. 50a; *cf. Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("federal Indian law" does not "authorize Indian tribes thus to market an exemption from state taxation").

Cougar Den also claims that the State's "revenue concerns are overstated and an inappropriate basis for certiorari." BIO 35. But Cougar Den stipulated that it wholesaled millions of gallons of fuel in just a few months in 2013, Pet. App. 64a, and it is undisputed that Cougar Den has avoided tens of millions of dollars in fuel taxes that are currently stayed pending resolution of the legal issue in this case. Cougar Den never explains why the loss of tens of millions of dollars in tax revenue based on a misinterpretation of a federal treaty is "an inappropriate basis for certiorari," BIO 35, and this Court's cases compel the opposite conclusion, repeatedly emphasizing the centrality of

the taxing power to State sovereignty. *See, e.g.*, *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870).

Although Cougar Den never meaningfully disputes that the Petition presents this Court with a clean vehicle to address the question presented, it briefly suggests that the case actually turns on a state law dispute about "Washington's fuel tax code." BIO 2, 33-34. But there is no relevant state law issue in dispute. Cougar Den claims that the case turns on whether the fuel tax is "a tax on 'bringing goods to market' or a tax directed at the goods themselves," BIO at 33, but those are federal concepts from the cases interpreting the treaty, not terms found anywhere in state law.

Finally, Cougar Den suggests that the issues in this case are unimportant because Washington "can amend its statutes" to prevent Cougar Den's tax avoidance. BIO 35. But Cougar Den offers no plausible way that this might be achieved and ignores that Washington's fuel tax already mirrors the tax this Court upheld in *Wagnon*, 546 U.S. 95. States across the country have adopted the same approach, and are understandably deeply concerned about the scope of the tax avoidance the Washington Supreme Court has enabled. *See* States' Amicus Br. 4 ("The Washington court's misreading of the right-to-travel provision has legal and practical significance far beyond Washington State boundaries or motor fuel taxes."). As Cougar Den distributes fuel to more and more reservations across the country, States that have already modified their laws in accordance with *Wagnon* should not now have to modify their laws again based on the Washington court's misreading of a federal treaty.

CONCLUSION

Cougar Den's arguments against certiorari fall short. The opinion below conflicts with decisions of the Ninth Circuit and this Court about vitally important issues of treaty interpretation and State taxing power. This Court should grant review.

RESPECTFULLY SUBMITTED.

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No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER

v.

COUGAR DEN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Article III of the Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians, 12 Stat. 952-953, secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." The question presented is:

Whether Article III precludes application to Yakama tribal members of a tax imposed by the State of Washington on fuel purchased out-of-state and imported into Washington, as part of a comprehensive state scheme that also imposes the tax on fuel removed from an in-state terminal or refinery.

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In the Supreme Court of the United States

No. 16-1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

v.

COUGAR DEN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In the mid-nineteenth century, the United States entered into a series of treaties with Indian tribes in what is now the State of Washington. *Tulee* v. *Washington*, 315 U.S. 681, 682-683 (1942). A group of Indians now known as the Yakama Indian Nation (the Tribe) agreed in one of those treaties to cede vast tracts of land within that territory to the United States, reserving for itself a much smaller reservation. *Ibid.* One of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region, including through the Tribe's

reservation. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1240-1241 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). To secure from the Tribe the concession that roads could be built through the reservation, the United States made certain representations regarding the Tribe's access to and use of public roads. Specifically, Article III of the Treaty provides:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians (1855 Treaty), art. III, 12 Stat. 952-953.

2. a. The Washington state law at issue imposes a per-gallon motor-fuel tax on "licensees," a category of persons that includes suppliers, exporters, blenders, distributors, and—as relevant here—importers of motor-vehicle fuel. Wash. Rev. Code Ann. §§ 82.36.010(12), 82.36.020 (West 2012), 82.38.020(12), 82.38.030 (West 2008).[1] The tax applies both to fuel originating in the State (for example, when a tanker truck is filled with fuel from a refinery or bulk storage facility) and to fuel brought into the State after being removed from a refinery or bulk storage facility outside of Washington. For fuel removed from an in-state refinery or terminal,

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[1] Citations are to the 2008 and 2012 Revised Code of Washington Annotated, which was in effect when the relevant conduct took place. The State has recodified the cited provisions without substantive change. See Pet. 4 n.1; Br. in Opp. 7 n.3.

the State imposes the tax at the time of removal (with certain exceptions not relevant here). *Id.* §§ 82.36.020(2)(a)-(b) (West 2012), 82.38.030(7) (West 2008). For fuel that "enters into" Washington from another State, the tax is imposed upon entry. *Id.* §§ 82.36.020(2)(c) (West 2012), 82.38.030(7)(c) (West 2008). Those who bring wholesale fuel into the State via the highways must pay the same per-gallon tax as those who bring fuel into the stream of commerce through other means. *Id.* §§ 82.36.020 (West 2012), 82.38.030 (West 2008).

b. Before the current motor-fuel tax was enacted, a federal court had determined that a previous version of the tax placed the incidence of the tax on fuel retailers (*i.e.*, gas stations). See *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005). That court had therefore held that the previous fuel-tax regime, as it pertained to Indian retailers operating on Indian lands, ran afoul of the rule that States generally may not tax Indian activities in Indian country absent congressional authorization. *Id.* at 1261-1262; see *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-459 (1995); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475-480 (1976).

In *Chickasaw Nation*, this Court held that a State could not apply its motor-fuel tax to fuel sold by a tribe to non-Indians in Indian country, but it noted that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Following that guidance, the Washington Legislature moved the incidence of its motor-fuel tax up the supply chain to entities that supply fuel to retailers, imposing the tax before the fuel

arrives on Indian reservations. See Pet. 5-6; see also *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 115 (2005) (holding that *Chickasaw Nation*'s bar on imposing state excise tax on a tribe or tribal members for sales in Indian country did not apply to a state tax imposed on the off-reservation receipt of fuel by a non-Indian distributor who subsequently delivered the fuel to a tribally owned gas station on the reservation). The Washington Legislature's intent and purpose set forth in the statute is to impose a per-gallon tax on motor fuel "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

3. Respondent, Cougar Den, Inc., is a business incorporated under Yakama Nation law. Its owner and president is an enrolled member of the Tribe. Pet. App. 2a. Beginning in 2013, respondent used public highways to transport fuel from Oregon to the Tribe's reservation in Washington. *Ibid.* Respondent contracted with a trucking company, KAG West, to have the fuel transported over the Oregon-Washington border. *Ibid.*[2] Respondent sold more than 90% of its fuel to Yakama-owned retail gas stations on the Tribe's reservation, which in turn sold the fuel to customers. *Id.* at 50a-51a. Respondent did not obtain a fuel-importer license or pay the Washington motor-fuel tax when either it or KAG West brought fuel into Washington. *Id.* at 2a. In December 2013, petitioner, the Washington State De-

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[2] Under the Washington statute, where an entity importing fuel into the State is acting as an agent, "the person for whom the agent is acting is the importer." Wash. Rev. Code Ann. § 82.36.010(16) (West 2012).

partment of Licensing (the Department), issued an assessment against respondent, demanding payment of $3.6 million in unpaid taxes, penalties, and licensing fees. *Ibid.*

Respondent appealed the assessment to an administrative law judge in the Department, who held that the assessment violated Article III of the 1855 Treaty, which secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953; see Pet. App. 2a-3a. The Department's director overturned the administrative law judge's order. Pet. App. 44a-61a. The director reasoned that Article III did not exempt respondent from paying the state motor-fuel tax because respondent "is not being taxed for using public highways"; rather, respondent "is being taxed for importing fuel." *Id.* at 58a. The director concluded that respondent "needs a Washington fuel importer license to bring fuel into this state." *Ibid.*

4. Respondent petitioned for review in Yakima County Superior Court, and the Superior Court set aside the director's order. Pet. App. 30a-43a. The court concluded that respondent's transport of fuel into Washington "falls within its [r]ight to [t]ravel" under the 1855 Treaty, and that because the Washington tax "places a restriction on the [r]ight to [t]ravel," the "taxes, penalties, interest, and licensing requirements" imposed by the state law "are preempted and barred by the Treaty." *Id.* at 34a.

5. The Washington Supreme Court granted direct review and affirmed. Pet. App. 1a-29a.

a. The Washington Supreme Court rejected petitioner's contention that Article III of the 1855 Treaty permits the State to restrict or regulate a specific good

that is incidentally brought over a highway. Pet. App. 6a. The court reasoned that petitioner's interpretation of Article III "ignores the historical significance of travel to the Yakama Indians" and the established rule of treaty interpretation that "Indian treaties must be interpreted as the Indians would have understood them." *Id.* at 5a-6a (citing *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970)).

The Washington Supreme Court observed that when the Treaty was signed, the Tribe "exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes," and it concluded that the Treaty was intended to preserve the Tribe's ability to travel on the public highways to engage in trade. Pet. App. 7a-8a. The court found support for its conclusion in cases in which the Ninth Circuit had held that a Washington law imposing license and overweight-permit fees on persons who hauled logs from the Tribe's reservation to off-reservation mills (see *Cree*, *supra*), and a Washington law that required individuals other than licensed wholesalers to give notice to the state liquor control board before transporting "unstamped" cigarettes within the State (see *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007)), could not be enforced against members of the Tribe. Pet. App. 9a-11a.

The Washington Supreme Court distinguished the Ninth Circuit's decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), in which a business owned by an enrolled member of the Tribe claimed an exemption based on Article III of the 1855 Treaty from a Washington statute that required the business to place money into escrow to reimburse the State for health care costs related to

the use of tobacco products. Pet. App. 12a-13a. In *King Mountain*, the Ninth Circuit concluded that the business was not exempt from making the escrow payments because the Treaty reserved to the Tribe the right "to travel upon all public highways," not the "right to trade." 768 F.3d 997-998. According to the Washington Supreme Court, *King Mountain* stands for the proposition that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." Pet. App. 13a. But here, the court concluded, "travel on public highways is directly at issue because the tax was an importation tax," and it "was impossible for [respondent] to import fuel without using the highway." *Id.* at 13a-14a; see *id.* at 16a.

b. Chief Justice Fairhurst dissented. Pet. App. 17a-29a. She explained that the Tribe's "right to travel" protected by the treaty "is not a right to trade," and the motor-fuel tax could therefore be applied to members of the Tribe because the tax "burdens trade[,] * * * not fuel transport." *Id.* at 17a. In her view, the Legislature's clear intent was "to levy an excise tax on the first instance of *wholesale possession* of fuel not distributed through a refinery or importation terminal within the state," and that "[w]hether that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due." *Id.* at 18a-19a.

Chief Justice Fairhurst further concluded that the treaty right "applies to trade only if inextricably linked to travel," which is not true of the Washington fuel tax. Pet. App. 25a; see *id.* at 23a. She explained that in *King Mountain*, the escrow payments required by state law "had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought

to bring to market in Washington." *Id.* at 26a. "Similarly," she continued, "Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Ibid.* She acknowledged that in *King Mountain* and in this case, "travel is necessary for trade" and that "[w]ithout travel, most goods have no market." *Ibid.* But she concluded that "necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption." *Ibid.*

DISCUSSION

The Washington Supreme Court erred in concluding that Article III of the 1855 Treaty exempted respondent from paying Washington's motor-fuel tax. The "right, in common with citizens of the United States, to travel upon all public highways" protected by the 1855 Treaty, 12 Stat. 952-953, is not violated by the tax at issue here, which taxes the introduction of a good into the state stream of commerce, no matter where the good originates or how it enters the State. The Washington Supreme Court's decision is also in tension with decisions of the Ninth Circuit interpreting the same treaty provision.

The Washington Supreme Court's decision will cause a significant loss of tax revenue for the State, and it is not immediately clear under that court's interpretation that the Washington Legislature could revise the statute in a way that would enable the State to collect an excise tax on motor fuel imported into Washington from another State before it arrives at the Tribe's reservation. And in light of long-running disputes about the scope of Article III of the 1855 Treaty, review by this

Court could also serve to bring needed clarity to the meaning of Article III. This Court's review is therefore warranted to correct the state court's error.

A. Article III Of The 1855 Treaty Does Not Exempt Respondent From Paying Washington's Motor-Fuel Tax

1. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). The legal incidence of Washington's motor-fuel tax occurs when wholesale fuel is brought into the stream of commerce in Washington, which occurs outside of the Tribe's reservation. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005). Accordingly, respondent is subject to the tax unless Article III of the 1855 Treaty exempts members of the Tribe from complying with the state law.

In determining the scope of an Indian treaty right, courts must construe the treaty "as the Indians would naturally have understood it at the time of the treaty," *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007), looking "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)); see *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942); *United States* v. *Winans*, 198 U.S. 371, 380-381 (1905). "[D]oubtful or ambiguous expressions" are to be "resolved in the Indians' favor." *Smiskin*, 487 F.3d at 1264; see *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970). Courts may not, however, ignore "clear * * * limit[s]"

appearing in the treaty. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995).

2. Under these principles, respondent is not exempt from paying Washington's motor-fuel tax. The tax is not properly viewed as a violation of respondent's "right, in common with citizens of the United States, to travel upon all public highways." 1855 Treaty, art. III, 12 Stat. 952-953. The incidence of the tax is not on the use of public highways, and imposition of the tax does not depend upon a taxpayer's use of the highways. To the contrary, fuel licensees must pay the tax regardless of whether they remove the fuel from an in-state terminal or refinery or import fuel into the State—and, if they import, regardless of what means of transport they use. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008).[3] The tax is assessed per gallon of fuel, at a set rate, without regard to how the fuel enters the stream of commerce. *Id.* §§ 82.36.020(1), 82.36.025 (West 2012), 82.38.030 (West 2008). The tax is thus appropriately viewed as an excise tax on "the first instance of wholesale possession of fuel within Washington," Pet. App. 17a (Fairhurst, C.J., dissenting) (emphasis omitted), not as a tax on the use of a public highway within the meaning of Article III of the 1855 Treaty. Article III does not exempt goods from taxation outside the Tribe's reservation simply because they are, or could be, transported by highway.

The history of Washington's motor-fuel tax further demonstrates that it is designed as an excise tax on the

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[3] The tax does not apply to fuel imported into the State by pipeline or vessel operated by a "licensee" and bound for a "terminal" or "refinery." Pet. App. 18a (Fairhurst, C.J., dissenting) (citing Wash. Rev. Code Ann. §§ 82.36.010(3), (4), (10), and 82.36.020(2)(c) (West 2012); *id.* §§ 82.38.020(4), (5), (12), and 82.38.030(7)(c) (West 2008)).

fuel itself, not as a tax on highway travel. As explained above (pp. 3-4, *supra*), before the Washington Legislature enacted the current version of the fuel tax, a federal court had concluded that a previous iteration of the tax had placed the incidence of the tax on fuel retailers, which posed a problem with respect to on-reservation Indian retailers due to the established rule that States generally may not tax Indian activities in Indian country. *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005); see Pet. 5; Pet. App. 20a-22a.

In *Oklahoma Tax Commission* v. *Chickasaw Nation*, *supra*, this Court held that although a state cannot impose a tax on fuel sold by a tribe in Indian country, "the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Following that guidance, the Washington Legislature amended the previous version of the motor-fuel tax by shifting its legal incidence up the supply chain to entities that supply fuel to retailers before the fuel arrives on an Indian reservation. *Ibid.*; Pet. 5-6. The Washington tax thus operates in the same way as the tax upheld by this Court in *Wagnon*, 546 U.S. at 99-100 (upholding Kansas tax imposed on fuel distributors upon "their initial receipt of motor fuel," where the distributors were permitted but not required to pass the tax down the distribution chain to retailers). That the State now taxes fuel when it is first possessed by a distributor in the State—whether when removed from a refinery or terminal rack at a bulk storage facility in the State, or brought in from out of State—thus reflects the State's effort to ensure that the incidence of the tax is not on Indian retailers operating on Indian reservations. It likewise does not

reflect an effort to impose any conditions or restrictions on using public highways.

3. The Washington Supreme Court concluded that the State motor-fuel tax is a tax on use of the highways because it "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. In reaching that conclusion, the court focused on the fact that, in respondent's case, the tax was triggered when respondent moved fuel across the state line inside a truck's tank. See *id.* at 13a-14a. The court recognized that the tax would be assessed "regardless of whether [respondent] uses the highway." *Ibid.* But the court considered that feature "immaterial" because "in this case, it was impossible for [respondent] to import fuel without using the highway." *Id.* at 14a. That analysis of the state fuel tax for purposes of Article III of the 1855 Treaty does not withstand scrutiny.

Characterizing a tax based on only one of the types of events that trigger it improperly severs that trigger from the larger statutory context. Cf. *Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Read as a whole, Washington's motor-fuel tax does not depend upon use of the highways, even if respondent happens to be using a highway at the time application of the tax to respondent is triggered. The regime as a whole seeks to tax the first wholesale possession of fuel in the State, regardless of how or where that possession occurs. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008). As the statute itself states, the Legislature's purpose was to impose

the motor-fuel tax "at the time and place of the first taxable event and upon the first taxable person within th[e] state." *Id.* §§ 82.36.022 (West 2012), 82.38.031 (West 2008). And the Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained the motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn from the refinery or terminal rack into a tanker truck and respondent then used the truck to transport the fuel over public highways to the Tribe's reservation. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack outside the State and brings it by truck into the State.

Thus, the fact that first possession for some regulated parties will occur on a highway does not convert an excise tax into a tax on the use of the highway—or a burden on the "right, in common with citizens of the United States, to travel upon all public highways," 12 Stat. 952-953—any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway. In both the hypothetical and the present case, the highway is only relevant because someone has chosen it as the setting for undertaking an act (here, possession of wholesale fuel) that is subject to a general encumbrance, wherever the act takes place. The Washington Supreme Court therefore erred in concluding that Article III of the 1855 Treaty exempts respondent from paying the state motor-fuel tax.

B. The Decision Below Is In Significant Tension With Decisions Of The Ninth Circuit Interpreting Article III Of The 1855 Treaty

1. The Washington Supreme Court's decision in this case is in significant tension with decisions of the Ninth Circuit—the federal circuit that encompasses the Tribe's reservation and ceded lands. The Ninth Circuit has held that Article III of the 1855 Treaty exempts members of the Tribe from complying with state laws that apply to and burden their right to use the public highways to bring goods to market, but does not secure any broader right.

a. In *Cree* v. *Flores*, 157 F.3d 762 (1998), the Ninth Circuit considered whether members of the Tribe were exempt from Washington laws that required registration and licensing of logging trucks along with payment of fees according to gross weight, as well as log-tolerance permits and an associated fee for overweight trucks. *Id.* at 765. The Tribe and some of its members brought a suit for declaratory and injunctive relief after state officials issued traffic citations to drivers employed by tribal logging businesses that had refused to obtain the necessary licenses or permits. *Ibid.* The Tribe contended that Article III of the 1855 Treaty protected the right of its members to haul timber from the reservation to off-reservation markets without restriction and that the State therefore could not impose licensing fees or permit requirements on logging trucks owned by the Tribe or its members. *Ibid.*

To determine how Article III would have been understood by the Indians when the Treaty was adopted, the district court conducted an extensive factual inquiry into the Treaty's history. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1246 (E.D. Wash. 1997),

aff'd *sub nom. Cree* v. *Flores*, *supra*. The court determined that at the time of the Treaty, the tribal members traveled extensively for the purpose of trade and played a central role in a trade network stretching from the Pacific Northwest to the Great Plains. *Id.* at 1238. Based on the language of the Treaty, the importance of travel to the Tribe, and representations made by federal negotiators, the court held that tribal members would have understood Article III to secure a right to use public highways without limitations such as fees. *Id.* at 1246-1249. The district court held, however, that the Tribe and its members must comply with state registration requirements for purposes of identification, to the extent the requirements did not impose a fee or surcharge on the treaty right. *Id.* at 1260.

The Ninth Circuit affirmed, holding that the 1855 Treaty exempted tribal logging companies from compliance with state licensing and permitting requirements, and payment of associated fees, for trucks hauling logs on public highways. *Cree*, 157 F.3d at 769. The court determined that the 1855 Treaty, read as the Tribe would have understood it, secured for the Tribe "the right to transport goods to market over public highways without payment of fees for that use." *Ibid.*

b. The Ninth Circuit again considered the scope of Article III of the 1855 Treaty in *United States* v. *Smiskin*, *supra*. In *Smiskin*, the United States charged two Yakama members with violating the federal Contraband Cigarette Trafficking Act, 18 U.S.C. 2342(a), which makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," and incorporates state law to define what is contraband. See 487 F.3d at 1263. The basis for the prosecution was that the defendants

had failed to comply with a Washington state law that required persons other than licensed wholesalers to give notice to state officials before transporting "unstamped" cigarettes—*i.e.*, cigarettes without either a "tax paid" or "tax exempt" stamp affixed to the packaging—within the State. *Ibid.* The federal Bureau of Alcohol, Tobacco and Firearms (ATF) had seized 4205 cartons of unstamped cigarettes from one of the defendant's residences because ATF agents suspected the defendants were transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. *Ibid.* The Ninth Circuit held that the defendants' violation of Washington's pre-notification requirement could not provide a valid basis for a federal prosecution under Section 2342(a) because applying the requirement to tribal members violated Article III of the 1855 Treaty. *Id.* at 1264.

The Ninth Circuit again took as its interpretive baseline this Court's rule that "[t]he text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indians' favor." *Smiskin*, 487 F.3d at 1264 (citing *Mille Lacs*, 526 U.S. at 196, 200). Based on the history of the Treaty described in *Yakama Indian Nation*, *supra*, the court of appeals concluded that the pre-notification requirement was a restriction and condition on the right to travel that violated Article III of the 1855 Treaty. *Smiskin*, 487 F.3d at 1266.

The United States continues to believe that *Smiskin* was wrongly decided.[4] But in any event, the Ninth Circuit clarified the limits of its *Smiskin* decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015).

c. In *King Mountain*, the court of appeals held that Article III of the 1855 Treaty did not exempt members of the Tribe from complying with a state law that required cigarette companies to place money into an escrow account for every qualifying unit of tobacco sold subject to the State's cigarette tax, in order to reimburse the State for public-health expenses related to the use of tobacco products. 768 F.3d at 990-992. The court rejected the Tribe's argument that Article III of the 1855 Treaty "prohibit[s] imposition of economic restrictions or preconditions on the Yakama people's Treaty right to engage in the trade of tobacco products." *Id.* at 997. The court explained that while the treaty secures for the Tribe a "right to *travel* * * * for the purpose of transporting goods to market" without state interference, it does not secure any right to *trade* beyond the right to transport

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[4] The purpose of Washington's pre-notification requirement was to enforce the collection of the State's tax on cigarettes. Such a tax may be validly applied to on-reservation sales of cigarettes to non-Indians, even by a tribe or its members, where the incidence of the tax is on the non-Indian purchaser. See, *e.g.*, *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154-157 (1980). The pre-notification requirement under Washington law was not directed to the use of public highways as such; it imposed only a modest regulatory requirement as part of a comprehensive cigarette-tax regime. And because the Tribe and its members were not exempt from enforcement of the State's overall cigarette-tax regime, there is no reason to conclude that Article III of the 1855 Treaty exempted the Tribe from this one feature incidental to transportation.

goods on the highways. *Id.* at 998 (emphasis added). Unlike the state laws at issue in *Cree* and *Smiskin*, the court reasoned, the escrow requirement did not apply to the transport of particular goods, but rather required cigarette companies to place money in escrow for each unit of tobacco sold. *Id.* at 991-992. Therefore, the court held that Article III did not exempt Yakama members from complying with the escrow law. *Id.* at 998.

2. The Washington Supreme Court's decision is in considerable tension with those Ninth Circuit cases evaluating the preemption of state laws.[5] The state laws in *Cree* and *Smiskin* required the Tribe to comply with certain requirements in connection with use of the public highways to transport its goods for trade. Tribal members were required to obtain licenses and permits and to pay fees as a precondition to operating logging trucks on the highways, see *Cree*, 157 F.3d at 765, or to pre-notify state officials when transporting unstamped cigarettes, see *Smiskin*, 487 F.3d at 1262. Washington's motor-fuel tax, by contrast, is levied on each gallon of fuel withdrawn from a refinery or terminal rack in the State or brought into the State, regardless of how the import occurs. Wash. Rev. Code Ann. § 82.36.020(1) (West 2012).

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[5] The Ninth Circuit applies a different framework to determine whether Article III of the 1855 Treaty creates an exemption from *federal* taxes. See *Ramsey* v. *United States*, 302 F.3d 1074 (2002), cert. denied, 540 U.S. 812 (2003). The court stated in *Ramsey* that the "applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty." *Id.* at 1078. The court concluded that Article III did not exempt a tribal member who hauled logs on public highways using diesel trucks from paying federal highway-use and diesel-fuel excise taxes. *Id.* at 1076.

That the tax is imposed by reference to the moment when motor fuel enters the State does not transform the tax into an impermissible burden on the use of the highways. To the contrary, for fuel that is imported, the tax is imposed when the fuel enters the state because the Legislature wanted to make clear that the tax was being imposed at the first moment of wholesale possession of motor fuel in Washington, *i.e.*, "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008). The motor-fuel tax is a general encumbrance of the same type as the escrow requirement in *King Mountain*, which was imposed on each unit of tobacco sold. The motor-fuel tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." Pet. App. 26a (Fairhurst, C.J., dissenting).

C. This Court's Review Is Warranted To Correct The Washington Supreme Court's Determination That The 1855 Treaty Exempts Respondent From Paying Washington's Motor-Fuel Tax

Whether this Court's review is warranted to correct the Washington Supreme Court's erroneous decision is a close question. On the one hand, both parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the 1855 Treaty; they simply disagree about where this particular Washington state tax falls within that framework. Moreover, as respondent points out (Br. in Opp. 32-34), the Washington Supreme Court's decision could be viewed as an erroneous characterization of a state law by the State's highest court, which could be left to

the State's political branches to correct and would not necessarily warrant intervention by this Court.

On the other hand, the Washington Supreme Court analyzed whether the state tax was a tax on the use of the highways for the sole purpose of determining whether the tax was preempted by a federal treaty, and the court's holding rests squarely on the federal question whether Article III of the 1855 Treaty exempts respondent from paying the state tax. Pet. App. 13a-14a; cf. *Oregon* v. *Guzek*, 546 U.S. 517 (2006) (vacating decision of the Oregon Supreme Court which had held that a state limitation on the introduction of evidence in capital proceedings violated the federal Constitution). And although respondent and the Tribe contend (Br. in Opp. 35; Tribe's Amicus Br. 10) that the state legislature is free to amend its law in response to the Washington Supreme Court's decision, it is not immediately apparent that the Legislature could amend its law in a manner that would satisfy the Washington Supreme Court that the State is taxing the possession—and not the transportation—of motor fuel. The Legislature already made clear that it was moving the incidence of the tax up the supply chain and imposing the tax either when fuel is removed from an in-state source or when it is brought over the border. Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008). If respondent's possession of fuel that it imports into the State will always be in a truck on a highway, then it is unclear whether the Washington Legislature could rewrite the law in a way that would cause the Washington Supreme Court to reach a different conclusion about preemption. And there could be a period of considerable uncertainty if it sought to do so. In light of the long-running disputes concerning invocation of Article III by

the Tribe and its members to claim exemptions from various Washington statutes governing cigarettes and motor fuels, review by this Court could serve to bring clarity to these issues.

Furthermore, although the Washington Supreme Court's decision involves the applicability of a single state tax to one tribally owned business, its reasoning could extend to any tax on the possession of a good that is imported into Washington by a member of the Tribe. Moreover, petitioner states (Pet. 29-30) that respondent has obtained or is seeking fuel exporter licenses in a number of other States, and the Washington Supreme Court's decision could lead to a refusal by respondent to pay a similar fuel-import tax in States into which it transported fuel by highway.

Petitioner and its amici further point out (Pet. 30-31; States' Amicus Br. 18-19) that the United States entered into treaties with tribes in Idaho and Montana that contain identically worded right-to-travel provisions. See Treaty of June 11, 1855, between the United States and the Nez Percé Indians, art. III, 12 Stat. 958; Treaty of July 16, 1855, between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 976. The existence of those other treaties could counsel in favor of allowing other state courts to interpret the relevant treaty language before this Court intervenes. In the meantime, however, Washington would be unable to collect what it contends would be a significant amount of tax revenue. Pet. 29-31.

On balance, the United States recommends that the Court grant review of the Washington Supreme Court's erroneous interpretation and application of Article III of the 1855 Treaty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
A YAKAMA NATION CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian Tribe that has inhabited and occupied the mid-Columbia River Basin since time immemorial. Long before the Yakama People first encountered American settlers, they were "inveterate traders" with extensive trading practices and territory. *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998). Their trading practices included trade with travelers entering Yakama territory, as well as trade that occurred well beyond their lands. *Yakama Indian Nation*, 955 F. Supp. at 1238.

The significance of the Yakamas' trading practices was recognized during the United States Government's treaty negotiations near present day Walla Walla, Washington. *Id.* at 1264. On June 9, 1855, the United States Government and the leaders of fourteen Indian tribes and bands entered into a treaty, the Treaty With the Yakamas. 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1959).

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief, and the parties have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

As the sovereign government primarily responsible for the regulation, administration and protection of those rights guaranteed to it in 1855, the Yakama Nation's interest in this appeal is the proper interpretation of the Yakama Treaty and how it applies to Cougar Den, Inc. ("Respondent"), a Yakama-owned business that is licensed and regulated by the Yakama Nation, and to the Washington State Department of Licensing ("Petitioner"). The Yakama Nation must and will intercede as a litigant or *amicus curiae* to defend the Yakamas' treaty rights when a party, such as the State government here, overreaches in a disingenuous attempt to fundamentally alter those solemn commitments the United States Government made to the Yakama People in 1855.

SUMMARY OF ARGUMENT

For over 100 years, Washington State has sought to limit the rights guaranteed to the Yakamas by the Yakama Treaty. See, *e.g.*, *United States v. Winans*, 198 U.S. 371 (1905); *State v. Towessnute*, 154 P. 805 (Wash. 1916); *Tulee v. State of Washington*, 315 U.S. 681 (1942). The Petition for Writ of Certiorari before this Court is simply an extension of Washington State's continuing efforts to limit the Yakama Treaty.

Over the past two decades, Washington State has repeatedly assaulted the Yakama Treaty's Article III right to travel provision. See, *e.g.*, *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) ("*Cree I*"); *Yakama Indian*

Nation, 955 F. Supp. 1229; *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). Petitioner continues this assault, carrying forward Washington State's centuries-old pattern of aggression against the Yakama Treaty.

Time and again courts – including the Washington Supreme Court in this matter – have held that the Yakama Treaty's right to travel provision unambiguously "guarantee[s] the Yakamas the right to transport goods to market" for "trade and other purposes." *Cree II*, 157 F.3d at 769. This is the case regardless of what "goods" are being transported. *Smiskin*, 487 F.3d at 1268. If a state fee or restriction interferes with the right to transport, then it is *per se* invalid. *Id.*

Washington State's current fuel tax scheme, enacted in 2007, was deliberately tailored by the state legislature to target the Yakama Nation, the Yakama People, and Yakama businesses in an effort to circumvent the protections guaranteed by the Yakama Treaty. Pet. 5-6. As implemented, the fuel tax scheme levies a tax and imposes licensing requirements on a specific activity – the act of importing fuel, i.e., transporting fuel, into Washington State. Despite the challenge filed by Petitioner, the Washington Supreme Court found such statutory scheme to violate federal law. Pet. 14a, 16a.

As held by the Washington Supreme Court, interpretation of the Yakama Treaty under controlling

canons of interpretation confirms that the Yakama Treaty is a federal law that exempts Yakamas from taxes and licensing requirements that place restrictions on the Yakama Peoples' use of public highways. Pet. 4a, 14a, 16a. In its review of this highly fact-bound matter, the Washington Supreme Court found travel on public highways to be directly at issue because the fuel tax scheme placed a tax on the "transportation of fuel", and "[h]ere, it was simply not possible for [Respondent] to import fuel without traveling or transporting that fuel on public highways." Pet. 16a. Not only did the Washington Supreme Court rightfully reject Petitioner's assertion that Respondent was not being taxed for using public highways, it reached its decision after evaluating the body of precedent developed in the Ninth Circuit and found any alleged conflict to be distinguishable on the facts. Pet. 6a-14a.

Petitioner once again seeks to narrow Yakama Treaty rights while expanding its authority. Petitioner asks this Court to reject the Washington Supreme Court's routine application of well-settled law regarding Indian treaty interpretation. Petitioner asks this Court to take a highly fact-bound matter and find conflict where none exists. Finally, based on unfounded assertions of States' interests and unpredictability created by the Washington Supreme Court's decision, Petitioner asks this Court to ignore available remedies and to instead reverse a century of thoughtful judicial practice and abrogate rights guaranteed by the United States Government to the Yakama Nation and its people in 1855.

Petitioner asks too much, and its groundless invitation to this Court to review the Washington Supreme Court's decision should be denied.

REASONS FOR DENYING THE PETITION

I. The Petition Asks this Court to Reject the Washington Supreme Court's Routine Application of Well-Settled Law Regarding Indian Treaty Interpretation

The ruling by the Washington Supreme Court follows this Court's precedent requiring Indian treaties in general, and the Yakama Treaty in particular, to be interpreted as the Indians understood the treaty terms when courts are addressing treaty-based challenges to state regulation.

This Court has repeatedly held that the interpretation of Indian treaties is subject to canons of construction favorable to the Indian party. See, *e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 227 (1985); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943). Under these canons, treaties are interpreted broadly and the text of a treaty must be construed as the Indians would naturally have understood it at the time of the treaty, with doubtful or ambiguous expressions resolved in the Indian's favor. *Winans*, 198 U.S. at 380-81 ("we have said we will construe a treaty with the Indians as [the Indians] understood it"); *Tulee*, 315 U.S. at 684-85 ("It is our responsibility to see that the terms of the treaty are

carried out, as far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"). Sources beyond the treaty necessarily aid that interpretation. *Winans*, 198 U.S. at 381 ("How the treaty in question was understood may be gathered from the circumstances").

Petitioner asserts that the Washington Supreme Court's treaty analysis conflicts with this Court's precedent. Pet. 25. There is no support in the record for Petitioner's untenable assertion.

The Washington Supreme Court acknowledged that state taxes and licensing requirements apply to the Yakamas "[a]bsent express federal law to the contrary," and rightfully concluded that the Yakama Treaty constitutes such express federal law. Pet. 4a (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973)); See *also*, *Cree I*, 78 F.3d at 1403 ("A treaty can constitute such an express federal law"); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (explaining that a treaty is the "law of the land" and is "to be regarded in courts of justice as equivalent to an act of the legislature").

The Washington Supreme Court observed that the issue before it centered "on the interpretation of the 'right to travel' provision in the [Yakama] treaty, in the context of importing fuel into Washington State." Pet. 1a. Appropriately, the Washington Supreme Court followed this Court's well-settled rule of Indian treaty interpretation and applied these canons in its examination of the Yakama Treaty's text and its assessment

of the factual record regarding the historical meaning of the right to travel provision developed in *Cree I*, *Yakama Indian*, *Cree II*, *Smiskin*, and *King Mountain*. Pet. 5a-12a.

The Washington Supreme Court rightfully concluded that Petitioner's erroneous "interpretation of the [right to travel] treaty provision ignore[d] the historical significance of travel to the Yakama," and similarly ignored "the rule of treaty interpretation" established by this Court. Pet. 6a. The Washington Supreme Court held that "the right to travel provision in the treaty protects the [Yakama]'s historical practice of using the roads to engage in trade and commerce." Pet. 14a. It also held that, here, the right to travel provision of the Yakama Treaty had been implicated as "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right[s]" guaranteed by the Yakama Treaty. Pet. 16a.

Not only did the Washington Supreme Court rule correctly, it demonstrated no conflict with this Court's holdings that warrants this Court's review. The Washington Supreme Court's decision was well reasoned and correctly applied this Court's well-settled rule of Indian treaty interpretation.

II. The Petition Asks this Court to Take a Highly Fact-Bound Matter and Find Conflict Where None Exists

Petitioner asserts that the Washington Supreme Court and the Ninth Circuit are split. Pet. 13. Despite the assertion, the conflict alleged is not present here because the Washington Supreme Court based its decision on specific and distinguishable facts. In ruling in Respondent's favor, the Washington Supreme Court evaluated the body of precedent developed in the Ninth Circuit, found any alleged conflict to be distinguishable on the facts, and concluded that Petitioner's arguments to the contrary were unpersuasive. Pet. 6a-13a.

The Washington Supreme Court rightly rejected Petitioner's argument that the specific facts presented in this matter were more similar to *King Mountain*, observing that under the facts of *King Mountain*, the right to travel provision in the Yakama Treaty was "not implicated" because the specific economic activity that was the subject of *King Mountain* did "not involve travel on public highways." Pet. 13a.

In contrast, the Washington Supreme Court evaluated the specific facts presented to it and found them to be "nearly identical" to the facts presented in *Smiskin* as both involved "travel on public highways," and in both instances "the State placed a condition on that travel, which affected the Yakamas' treaty right to transport goods to market without restriction." *Id.* The Washington Supreme Court also found such restriction to be more than simple regulation of a Treaty protected

activity, with the licensing requirement here serving as a vehicle for tax collection, just as the pre-notification requirement had served in *Smiskin*. Pet. 14a.

In recognition of the critical distinctions between *King Mountain* and *Smiskin*, the Washington Supreme Court distinguished Ninth Circuit precedent, correctly concluded that *Smiskin* controls, and provided explanation for why the conflicts alleged by Petitioner did not prove that other courts would reach different decisions if faced with the same or very similar facts. Pet. 13a-14a. Given this reconciliation of Ninth Circuit precedent, there is no conflict that warrants this Court's review.

III. The Petition Asks this Court to Ignore Available Remedies and Judicially Expand States' Authority to Tax Based on Unfounded Assertions of States' Interests and Unpredictable Impacts

Petitioner advocates for a major shift in authority and proposes that this Court narrow the commitments made to the Yakama Nation in 1855 in order to save the States from loss of imaginable future revenues generated by imposition of unlawful taxes and penalties. Pet. 29-30. Petitioner similarly claims that such action is necessary to shield the States from a guarantee of unpredictability created by the Washington Supreme Court's decision. Pet. 30-31. This overreach by Petitioner has become an all too common and

disingenuous argument that the Yakama Nation must unwaveringly defend against to protect the Yakamas' treaty rights.

In carrying forward Washington State's two-decade assault on the Yakama Treaty's right to travel provision, Petitioner describes to this Court generalized allegations of harm to taxpayers, competitive disadvantages faced by businesses, and loss of state revenue resulting from the Yakamas exercise of the Yakama Treaty's right to travel provision. Pet. 24, 29. Petitioner raised similar concerns before the Washington Supreme Court, claiming that a finding in favor of Respondent would lead to "unimagined and unintended preemption of fundamental state powers." Pet. 14a. The Washington Supreme Court summarily rejected this assertion, holding that this matter does not present the "parade of horribles" concern raised by Petitioner. Pet. 16a. Unfounded assertions of States' interests and unpredictable impacts by Petitioner do not and cannot demonstrate why this matter merits this Court's review.

Antithetical to Petitioner's generalized allegations, Petitioner has asserted good reason for this Court to not review the Washington Supreme Court decision. If States are unable to enforce a tax because the legal incidence is on Indians or Indian tribes in violation of federal law, then States are free to amend their laws to shift the tax's legal incidence. See *e.g.*, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). Petitioner acknowledges that such statutory lawmaking is an available remedy to its taxation

problem presented here, with the state legislature having enacted a similar curative measure in 2007 that resulted in Washington State's current fuel tax scheme. Pet. 5-6. Such available remedy provides sufficient reason for this Court to deny the Petition.

Rather than accept this remedy to its taxation concern, Petitioner would instead have this Court step into the shoes of both Congress and the state legislature to judicially abrogate treaty rights guaranteed to the Yakama People. The Washington Supreme Court refuted a similar assertion. Not only did it reject Petitioner's generalized allegation of an unfounded "parade of horribles" that would beset the States absent judicial treaty reform, the Washington Supreme Court rightfully held that "[i]f the State has concerns about [the Yakama Treaty right to travel] provision, only Congress can revise or restrict the provisions, not this court." Pet. 16a.

Absent clear congressional commands, Petitioner's goal of treaty reform must yield to the United States Government's interest in honoring the solemn commitments made to the Yakama Nation in 1855.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RECORD AND BRIEFS

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In The
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

BRIEF *AMICUS CURIAE* OF THE STATES OF IDAHO, KANSAS, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* STATES[1]

In *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995), this Court recognized legal incidence as "'a reasonably bright-line standard'" in determining challenges by a tribe or a tribal member to a state tax. But legal incidence constitutes only the starting point by identifying *who* the taxpayer is. As the Court explained in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005), the *where* of the tax – *i.e.*, whether the legal incidence attaches inside or outside Indian country – has equally "significant consequences." That is so because "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Here, no dispute exists about the "who" or the "where." The taxpayer is Respondent, a Yakama Nation member-owned corporation, while the legal incidence of the Washington motor fuels tax concededly attached when Respondent's contractor entered the state outside the Yakama Indian Reservation with fuel purchased in Oregon. The dispute thus narrows down to a single question: Does the right-to-travel provision in Article III of the 1855 Treaty with the Yakama Nation embody the requisitely "express federal law to the contrary" that

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[1] Under S. Ct. R. 37.2, counsel of record for all parties received notice at least ten days prior to the due date of this brief of *amici curiae*'s intention to file it. Neither consent nor leave of Court is required under S. Ct. R. 37.4.

prevents application of the Washington statute to Respondent?

The *amicus curiae* States have a straightforward interest in that question being answered definitively. This is not a parochial controversy affecting only one State and one tribe or its members. First, other tribes with identically-worded 1855 treaty provisions have reservations in Idaho and Montana. Second, the right-to-travel provisions in these treaties extend to "*all* public highways." [Emphasis added.] They thus have a preemptive radius of potentially expansive geographical range. Finally, the Washington Supreme Court has given the Yakama treaty provision an interpretation that transforms a right to use public highways for travel purposes into an exemption from state authority to impose taxes or fees on trade conducted *via* highway or, by logical extension, any activity associated with the highway use. This interpretation conflicts with decisions from the Ninth Circuit Court of Appeals dealing with the same treaty language and misapplies the Indian canons of construction. That misapplication, if followed by other courts, will prevent or significantly complicate the enforceability of not only fuel taxes but also other tax laws. These considerations plainly warrant granting *certiorari*.

SUMMARY OF THE ARGUMENT

This Court recognizes the necessity of "reasonably bright-line standard[s]" for the efficient administration of federal and state tax laws to determine their applicability to Indians. *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999). Two complementary standards control the outcome here – one tailored specifically to revenue-generating laws, and the other sweeping across the broad range of state regulation but initially announced in a taxation context. Both reflect the importance of a tax's legal incidence. Within Indian country set aside for their occupancy, tribes and tribal members possess immunity from state taxation whose legal incidence falls upon them absent Congressional consent. Once a tribe or its members leave Indian country set aside for their occupancy, the rule flips; *i.e.*, they become subject to nondiscriminatory, generally applicable state law unless "express federal law to the contrary" says otherwise. *Mescalero Apache Tribe*, 411 U.S. at 148-49. Together, these rules mean that courts in taxation cases must resolve where the tax's legal incidence attaches and whether the requisite federal law authorization or prohibition exists.

The present dispute comes to this Court only as to the second of those inquiries. The parties agree that the legal incidence of Washington's motor fuels tax attached to Respondent upon the fuel's importation into the state and outside the Yakama Reservation. The right-to-travel provision in Article III of the 1855 Treaty constitutes the sole "express federal law to the contrary" proffered to exempt Respondent from the

Washington tax's application. However, neither the provision's literal language nor the extensive treaty negotiation analysis in prior federal court litigation supports this reliance. The Washington Supreme Court's holding instead conflicts with Ninth Circuit decisions addressing claims predicated on the Article III right to travel and, more fundamentally, rests on an interpretation that misapplies Indian canons of construction.

The Washington court's misreading of the right-to-travel provision has legal and practical significance far beyond Washington State boundaries or motor fuel taxes. Isaac Stevens, then Superintendent for the Washington Territory, negotiated a series of treaties with Pacific Northwest and Intermountain tribes during 1854 and 1855, including two with Idaho and Montana tribes that contain right-to-travel language identical to the first paragraph in Article III. The decision below therefore directly invites adoption of business models like Respondent's by members of those tribes. Equally important, the Article III provision secures to the several tribes and their members "the right . . . to travel upon all public highways." No need existed in this case to resolve the exact geographical reach of "all public highways," but it plainly has a scope beyond the boundaries of Idaho, Montana and Washington and, if not simply assigned its literal meaning, portends complex and resource-depleting litigation over the treaty parties' understanding concerning the scope and nature of the highway right. Finally, disputes over the application of the Yakama right-to-travel provision have arisen in a variety of taxation

and other contexts involving a tribal member's off-reservation use of the public highway system for commercial purposes. Leaving in place the current uncertainty over the provision's proper interpretation will increase the likelihood of continued attempts to escape application of state law comparable to Respondent's activity here and impede the States' ability to fashion appropriate legislative responses.

ARGUMENT

I. THE PETITION PRESENTS AN OPPORTUNITY FOR THIS COURT TO REAFFIRM THE NEED FOR "EXPRESS" FEDERAL LAW EXEMPTING TRIBES OR THEIR MEMBERS FROM APPLICATION OF NON-DISCRIMINATORY STATE LAW WHEN OFF RESERVATION

Substantial symmetry exists with respect to on- and off-reservation application of state tax law to Indian tribes and their members. Although this Court has "not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent" with respect to on-reservation conduct, "[i]n the special area of taxation of Indian tribes and tribal members, we have adopted a *per se* rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 & n.17 (1987). This distinction flows from the fact that "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is

correspondingly weak" – making it "unnecessary to rebalance these interests in every case." *Id.* at 215 n.17; *see also County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 683, 688 (1992) ("And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'").

The Court has set in place a corresponding, if broader, *per se* rule subjecting tribes and their members to nondiscriminatory state law once they leave their reservations. *See Organized Vill. of Kake v. Egan*, 369 U.S. 60, 75 (1962) ("State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. . . . Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, . . . in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* [*v. Washington*, 315 U.S. 681 (1942)] to fishing within a reservation.") (citations omitted).

This Court succinctly synthesized earlier decisions on off-reservation state authority in *Mescalero Apache Tribe*, a case involving challenged application of New Mexico gross receipts and compensating use taxes to an off-reservation tribal ski resort located on federal land. There, the Court found that Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25

U.S.C. § 465 – which exempts "any lands or rights acquired" under the IRA by the United States on behalf of a tribe or Indian from state and local taxation – provided the requisite "express federal law to the contrary" to preempt application of compensating use tax imposed on ski lifts permanently affixed to tribally leased land but not the gross receipts tax on income generated from the resort's operation. 411 U.S. at 155-59. The Court has adhered to *Mescalero Apache Tribe*'s formulation of off-reservation state authority. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (state gaming law); *Kiowa Tribe v. Mfg. Techns., Inc.*, 523 U.S. 751, 755 (1998) (contract enforcement); *Chickasaw Nation*, 515 U.S. at 462-64 (income tax imposed on tribal members domiciled off reservation with respect to Indian country tribal employment); *see also Wagnon*, 548 U.S. at 112-13 (rejecting application interest-balancing test applied to on-reservation taxation of non-members engaged in commercial transactions with tribes or their members to non-Indian fuel distributor where the tax incidence arose off reservation); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (distinguishing *Mescalero Apache Tribe* based on the status of trust land as Indian country with respect to imposition and collection of cigarette tax on sales to tribal members).

This Court has rarely found the express-federal-law exception to exist in the state taxation context. In *County of Yakima*, it held Section 5 of the General Allotment Act of 1887 ("GAA"), 25 U.S.C. § 348, and GAA

Section 6, as amended by the 1906 Burke Act, *id.* § 349, authorizes imposition of state *ad valorem* taxes on reservation land patented in fee to tribal members. 502 U.S. at 263-64 ("Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes. [¶] The Burke Act proviso . . . made this implication of § 5 explicit, and its nature more clear. . . . [T]he proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.").[2] It followed *County of Yakima* in *Cass*

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[2] Section 6, as amended by the Burke Act, provides:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998), where it unanimously upheld imposition of county property taxes on reservation land that had been conveyed in fee under the Nelson Act, Act of Jan. 14, 1889, ch. 24, 25 Stat. 642, and eventually reacquired by the resident tribe. *Id.* at 115 ("When Congress makes Indian reservation land freely alienable, it manifests an unmistakably clear intent to render such land subject to state and local taxation."). Other than the compensating use tax in *Mescalero Apache Tribe*, the Court has never held preempted a state tax imposed on a tribe or tribal member where the legal incidence attached off reservation.[3]

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[3] This Court did *reject* in *Chickasaw Nation* the argument that the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (1846), provided the requisitely express federal law exemption with respect to taxing the income of tribal members residing outside, but employed within, Indian country. The members relied upon a provision that secured to the tribe " 'the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws. . . .' " 515 U.S. at 465. The Court made short work of the argument, looking to the treaty's unambiguous text:

> By its terms, the Treaty applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.

Id. at 466.

Mescalero Apache Tribe, *County of Yakima* and *Cass County* make plain that the term "express" – or its alternative formulation of "unmistakably clear" (*Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)) – demands, if not explicit language removing otherwise extant off-reservation taxing authority, a treaty or statutory provision whose application necessarily precludes the exercise of that authority. *See, e.g.*, *Tulee*, 315 U.S. at 685 ("[T]he state is without power to charge the Yakimas a fee for fishing. . . . We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty."). The Washington court did not apply that stringent standard. Indeed, other than a perfunctory nod to *Mescalero Apache Tribe* at the beginning of its legal analysis (Pet. 4a), the majority opinion paid no discernible heed to the necessity of an "express" – as opposed to a judge-made conclusion drawn from laboriously wrought treaty construction – exemption from state law. The Washington Supreme Court's decision thus charts a course that finds no precedent in this Court's application of the "express federal law" exception and calls for *certiorari* review.

II. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE YAKAMA TREATY'S RIGHT-TO-TRAVEL PROVISION NOT ONLY CONFLICTS WITH THE NINTH CIRCUIT'S INTERPRETATION BUT ALSO PRESENTS A SIGNIFICANT QUESTION OVER PROPER APPLICATION OF THE INDIAN CANONS THAT THIS COURT SHOULD RESOLVE

A. Petitioner presents a detailed discussion of the conflict between the Ninth Circuit's and the Washington Supreme Court's reading of the Article III right-to-travel provision. Pet. 13-24. The *amicus* States concur in that analysis. However, they believe that two points bear emphasis.

First, the Washington court correctly concluded from the record made in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd*, 157 F.3d 762 (9th Cir. 1998), that "[*t*]*ravel* was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes" and that "at the time, the Yakamas exercised free and open *access* to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes." Pet. 7a (emphasis added); *see Yakama Indian Nation*, 955 F. Supp. at 1238-40. The *Yakama Indian Nation* findings reflect why the treaty parties included "the right, in common with citizens of the United States, to travel

upon all public highways": travel outside the reservation set aside under Article II of the treaty was necessary for the Nation and its members to carry on their traditional trade and subsistence practices.

But even a casual review of *Yakama Indian Nation*'s summary of the tribe's pre-treaty practices reveals nothing that suggests that either the federal or the tribal negotiators intended to reserve in Article III's *first* paragraph a right to trade or engage in usufructuary activities. Had parties so intended, that paragraph plainly would have incorporated a reference to such activities. The Article instead addresses location-related reserved rights in the *second* paragraph – all of which involve subsistence practices.[4] The Washington court's analysis additionally stripped the *Yakama Indian Nation* findings from the challenged regulatory context – truck license and overweight permit fees – that directly conditioned lawful use of the vehicles being used to travel. *See Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998) ("We agree with the district court that,

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[4] The second paragraph reads:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty With the Yakama, June 9, 1855, art. III, 12 Stat. 951, 953 (1859).

in light of those and its other findings, the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use."). So, for example, nothing in the *Yakama Indian Nation* decision or its affirmance in *Cree v. Flores* suggests that a tribal member would be immune from paying a sales tax on meals or beverages purchased off reservation while hauling logs to a mill for processing.[5] The Washington Supreme Court's reasoning proves too much.

Next, the Washington court's analysis of *United States v. Smiskin*, 487 F.3d 1260, 1279 (9th Cir. 2007), and *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 996 (9th Cir. 2014), is similarly flawed. Pet. 9a-14a. *Smiskin* found that the treaty right-to-travel precluded application of a state law that made transportation of unstamped cigarettes within Washington by persons other than licensed wholesalers unlawful unless the state liquor control board received prior notice. 487 F.3d at 1263. Although reaching a highly questionable result, the Ninth Circuit panel nonetheless tied the involved illegality – the absence of

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[5] Although not at issue in this case, the *amicus* States see nothing in the *Yakama Indian Nation* treaty history findings to support the proposition that state gas or diesel taxes could not be imposed on tribal or tribal member vehicles for off-reservation purchases where the legal incidence falls upon the consumer. Those taxes derive from discretionary decision-making on the tribe's or a member's part; *i.e.*, the State does not require them to purchase the fuel off reservation any more than it requires them to purchase food or drink at a highway convenience store. But that type of tax at least has some relationship to the means of transportation. The taxes here do not.

pre-notification – to the treaty right; *i.e.*, the pre-notification requirement conditioned the tribal member's right to use the public highways lawfully. *Id.* at 1266 ("Tribal members were not required to notify anyone prior to transporting goods to market at the time of the treaty, and the Treaty guaranteed to them the same rights today."). *King Mountain Tobacco* runs counter to the Washington Supreme Court's treaty interpretation, since it specifically held that Article III does not create a right to trade. 768 F.3d at 998 ("there is no right to trade in the Yakama Treaty"). Contrary to the majority opinion's apparent understanding (Pet. 13a), moreover, the tribal member-owned company shipped the involved goods (unblended tobacco) from the reservation for processing and then shipped the blended product back to the Yakama Reservation in its own trucks. *Id.* at 991; *see also King Mountain Tobacco Co. v. McKenna*, No. CV-11-3018-LRS, 2013 WL 1403342, at *2, *7 (E.D. Wash. Apr. 5, 2013) (describing King Mountain Tobacco's business model and extensive off-reservation contacts with North Carolina for tobacco blending). *King Mountain Tobacco*'s Article III analysis turned not on the absence of the company's use of public highways in its commercial activities but on the absence of any restriction under the challenged state tobacco regulation on the right to use those highways. A critical difference exists, in short, between denying access to the public highway system and burdening through taxation or other regulatory measures activity that occurs in connection with use of that system. Here, the challenged law does not restrict the Respondent's right to travel on Washington public

highways; it simply requires Respondent, like any other motor fuel distributor, to pay a tax upon "first receipt" of fuel in the state.

B. More fundamentally, review of the Washington Supreme Court's decision is warranted because it misapplied the Indian canons of construction. They instruct that "treaties with Indians must be interpreted as [the Indians] would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). The canons have ancient lineage, tracing back at least to Justice M'Lean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). This Court nevertheless has recognized that "the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). Consistent with that admonition, "courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985); *see also Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.").

The off-reservation right-to-travel provision in Article III of the Yakama treaty must be read *in pari materia* with the preceding portion of the first paragraph

and the second paragraph. The treaty parties unambiguously limited the exchange of promises in the first to road- or highway-related matters. The tribe accepted the Government's right to establish roads "for the public convenience" through the reservation – to which the tribe otherwise had exclusive occupancy rights under Article II[6] – but reserved (1) "the right of way, free access to the nearest public highway" from the reservation and (2) "the right, in common with citizens of the United States, to travel upon all public highways." The second paragraph then identified the other Article III rights reserved to the tribe under the treaty – *i.e.*, the exclusive right of taking fish from streams on or bordering the reservation; the right of taking fish "at all usual and accustomed places, in common with the citizens of the Territory"; the right to erect temporary buildings for fish curing purposes; and hunting, gathering and pasturing rights "upon open and unclaimed lands." No ambiguity attends the fundamental *activities* to which the tribe reserved rights to engage in under Article III. The treaty's unvarnished language thus reflects that the treaty parties

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[6] In relevant part, Article II provides with respect to the land set apart for tribal occupancy:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

12 Stat. at 952.

identified the rights that they intended to reserve for the tribe's benefit. Conspicuously absent from those activities is the right to trade free of territorial (now state) restriction.

The *Yakama Indian Nation* district court findings concerning the right-to-travel provision, if anything, underscore that the first paragraph merely "reserved [to the Yakamas] the right to travel in pursuit of traditional practices." 955 F. Supp. at 1253. Those practices included the usufructuary activities reserved under the second paragraph of Article III and one *not* reserved under the treaty – the Yakamas' pursuit of "trade and exchange" with other tribes. *Id.* at 1252. Viewed in its textual and historical contexts, therefore, the right-to-travel provision served to facilitate the exercise of certain subsistence and commercial activities, not to create *sub silentio* an entirely new reserved right immune in whole or part from off-reservation application of non-discriminatory state law.

The plain treaty language brings this dispute full circle back to the necessity of Respondent establishing "express federal law" that forecloses application of the state motor fuels tax. In that regard, the Ninth Circuit's decision in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), has singular relevance given its determination that the right-to-travel provision did not contain the "express exemptive language" essential to negate imposition of federal excise taxes on heavy trucks and diesel fuel with respect to off-reservation use. *Id.* at 1078-79. Although *Ramsey* involved federal,

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not state, taxes, it nevertheless stands for the otherwise inescapable conclusion that Article III's first paragraph says nothing that precludes Washington or other States from taxing activities, other than arguably those described in the second paragraph, that occur during the tribe's or its members' use of public highways. Unless judicially expanded beyond its text, in sum, the right-to-travel provision does not embody the requisitely "express" federal limitation on a State's authority to apply its non-discriminatory laws to the Yakama Nation or its members. The Indian canons do not sanction this expansion by either the Washington Supreme Court or the Ninth Circuit. *Cf. Chickasaw Nation*, 515 U.S. at 466 ("But liberal interpretation cannot save the Tribe's claim, which founders on a clear geographical limit in the Treaty.").

III. THE SCOPE OF THE RIGHT-TO-TRAVEL PROVISION IN THE YAKAMA TREATY HAS PRACTICAL AND LEGAL SIGNIFICANCE FAR BEYOND THE CONTROVERSY HERE

This is not a parochial dispute whose outcome affects only Petitioner and Respondent or one type of tax. Superintendent Stevens alone or jointly with Joel Palmer, then Superintendent for the Oregon Territory, negotiated identically worded right-to-travel provisions shortly after the Yakama treaty with the Nez Perce Tribe, whose reservation is in Idaho, and the Flathead Tribes, whose reservation is in Montana. Treaty With the Nez Perces, June 11, 1855, art. III, 12 Stat. 957, 958 (1859); Treaty With the Flatheads

(Treaty of Hell Gate), July 16, 1855, art. III, 12 Stat. 975, 976 (1859). Both States are therefore subject to the same type of federal-state court conflict involved here. Indeed, the Washington Supreme Court's decision invites such state court litigation because of the possibility of achieving a more generous construction of the treaty provision than under extant Ninth Circuit precedent. The jurisdictional limitation in 28 U.S.C. § 1341 further ensures state court litigation when, as in this case, only a tribal member or corporate surrogate sues. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1975); *Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228, 1324 (9th Cir. 1979); *see also Osceola v. Florida Dep't of Revenue*, 893 F.2d 1231, 1235 (11th Cir. 1990).

Yet beyond the Northwest is a broad swath of potentially affected States. The right-to-travel provision in the three treaties applies to "*all* public highways." [Emphasis added.] Literally read, the provision's geographical reach extends throughout the United States. Even a more limited construction – *e.g.*, the Yakama Nation's pre-treaty trade, usufructuary and social travel area – would encompass a huge territory. *See Yakama Indian Nation*, 955 F. Supp. at 1238 ("The Yakamas' way of life depended on goods that were not available in the immediate area; therefore, they were required to travel to the Pacific Coast, the Columbia River, the Willamette Valley, California, and the plains of Wyoming and Montana to engage in trade."). And to the extent the dispute involved application of the Nez Perce or Flathead treaty right-to-travel provision, the specter of "undertak[ing] a factual inquiry into the

intent and understanding of the parties at the time the Treaty was signed to determine the meaning of the highway right" looms. *Cree v. Waterbury*, 78 F.3d 1400, 1404 (9th Cir. 1996).

Finally, as the litigation to date over the Yakama provision reflects, the range of possibly affected taxes or fees is substantial. Aside from fuel, motor vehicle and tobacco taxes, the Washington Supreme Court's reasoning arguably captures taxes on items purchased off reservation and transported on "public highways" back to the reservation by a tribal member for commercial use or sale (or, conceivably, for personal use). States, in theory, can enact ameliorative laws that alter a tax's legal incidence and shift it to an entity with no immunity (*see* Pet. 3-4), but no discernable interest in efficient governance is served by requiring them to adjust their statutory regimes when a decision from this Court may avoid the need for, or clarify the appropriate scope of, a legislative response. There is, as well, no assurance that this species of a single State's legislative fix will eradicate the possibility for tax avoidance by tribal members. Respondent has successfully done so to this point by purchasing fuel in Oregon and using an exemption under that State's law to eliminate *any* taxation on its distribution of motor fuel. Given the centrality of effective tax administration to any government, a high measure of certainty in the rules of the road is essential so that, if required, States can develop legislative responses to such tactics. This Court should step in and provide that certainty here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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RECORD AND BRIEFS.

No. 16-1498

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN INC., A YAKAMA NATION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF OF *AMICI CURIAE* THE WASHINGTON OIL MARKETERS ASSOCIATION AND WASHINGTON ASSOCIATION OF NEIGHBORHOOD STORES IN SUPPORT OF PETITIONER

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A. INTRODUCTION

This brief is submitted on behalf of the Washington Oil Marketers Association ("WOMA") and the Washington Association of Neighborhood Stores ("WANS") in support of Washington State's petition seeking reversal of the decision of the Washington Supreme Court. This brief is filed with the consent of all parties pursuant to Rule 37(3)(a).[1]

B. INTEREST OF *AMICI CURIAE*

WOMA is a nonprofit trade association with individual and corporate members that market petroleum products in Washington State and associate members that sell products and services that support the petroleum industry. WOMA members account for nearly 80% of all

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[1] Copies of the consent letters have been filed with the Clerk of the Court with this brief. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authorized this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

petroleum products sold in Washington State, including 68,000,000 gallons of heating oil to residential and industrial users.

WOMA is closely aligned with two regional trade associations: The Pacific Oil Conference ("POC") and the Western Petroleum Marketers Association ("WPMA"). WOMA is also a member of the national Petroleum Marketers Associations of America ("PMAA"), which represents petroleum marketers on national issues in Washington D.C.

WOMA is the only association in Washington State that focuses on all aspects of the petroleum marketing industry and monitors legislative and regulatory issues involving fuel, energy, alcohol, tobacco, transportation, the environment, and the state budget and taxes. WOMA also lobbies on behalf of petroleum marketers and oil heat dealers with state government agencies and the Washington State Legislature, and stays engaged

with state and national associations, including PMAA, WPMA, and POC.

WANS is a business organization that provides information and assistance to Washington State's convenience store industry on a wide variety of topics including legal, legislative, and regulatory issues to enable that industry to remain competitive in the marketplace.

C. STATEMENT OF THE CASE

WOMA/WANS adopt the Statement of the Case in Washington State's petition.

D. SUMMARY OF ARGUMENT

The legal incidence of Washington State's fuel tax occurs off the Native American reservations in that state. It applies to fuel suppliers. Cougar Den is such an off-reservation fuel supplier. Its activities in supplying fuel relate essentially to off-reservation activities.

At issue here is article III of the treaty with the Yakamas. It states:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Yakama Treaty, art. III, 12 Stat. 951 (1855). That treaty between the United States and the Yakama Nation giving Yakama tribal members a right to travel without fees on public highways does not confer upon that tribe a "right to trade." In suggesting to the contrary, the Washington Supreme Court opinion contravenes Ninth Circuit precedent interpreting the same treaty language and long-standing principles of this Court in interpreting Native American treaties.

Further, the Washington court's interpretation will effectively confer tax-exempt status on tribal businesses that will blow gaping holes in the state's fuel tax

revenues and budgets. The opinion's analysis cannot simply be confined to fuel taxes and will also affect numerous other areas of taxation. This will provide unfair advantage to tribal businesses over nontribal business entities who must comply with state tax imperatives.

Review by this Court is crucial to avoid conflicting judicial treatment of the same federal treaty provision and to uphold key principles Native American treaty interpretation.

E. ARGUMENT

(1) Washington Fuel Taxes

Initially, critical to this Court's decision on Washington State's petition for a writ of certiorari is a clear understanding of the nature of Washington's fuel tax and its legal incidence as to entities like Cougar Den. *See*

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generally, Auto. United Trades Org. v. State, 357 P.3d 615 (Wash. 2015) ("*AUTO*").

The fuel market in Washington involves a four-tiered distribution chain. *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250, 1252 (W.D. Wash. 2005); *see, e.g.*, RCW 82.36.010(12), (13), (17). Suppliers, also called licensees, are the refineries, producers, or importers that produce, blend or import fuel in Washington. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport fuel between suppliers and retailers. *Id.* Retailers sell fuel to consumers. *Id.* Consumers purchase fuel from the retailers for use in their vehicles. *Id.*

Suppliers refine fuel or bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport the fuel between suppliers, usually by purchasing fuel from suppliers at a "terminal rack," which is the platform

or bay at which motor vehicle fuel from a refinery or terminal is delivered into trucks, trailers, or rail cars. *Id.* Although a state cannot impose a tax on tribal activities occurring within a reservation,[2] activities outside reservation boundaries are subject to a state's general tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146-49 (1973) (upholding state gross receipts tax imposed on tribe's ski resort operated off-reservation). A fuel tax collected from suppliers or distributors operating off-reservation that is not required to be passed down the distribution chain is a lawful state tax, and a tribe and its members are not immune from paying it. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (upholding state fuel tax because legal incidence fell on distributors operating off-reservation). In cases

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[2] *See, e.g., McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165-66, 171-73 (1973) (invalidating state income tax imposed on tribal member's income earned on reservation).

assessing whether a tribe is immune from state taxation, this Court clarified that the "legal incidence" of a tax – where and upon whom the tax is being imposed – is the determining factor. *Id.* at 101, *citing Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458-60, 462-64 (1995). The concept of tax incidence is critical to understanding the present case because the legal incidence of a tax determines whether there is a valid claim for preemption or immunity. If a tax is imposed on a distributor and is *voluntarily* passed through the chain of distribution as part of the cost of doing business, the incidence of the tax falls on the distributor, and not on any of those subsequent purchasers such as retailers or consumers. *Wagnon*, 546 U.S. at 103. Thus, those subsequent retailers and consumers are not entitled to exemptior from those taxes simply because they are doing their business on tribal land, because the tax is not imposed for activities taking place on tribal land. *Id.*

As the case law on tribal immunity and fuel taxation has evolved, the Washington Legislature shifted the incidence of Washington's fuel tax. In 1994, the fuel tax was collected from distributors, who were *required* to pass the tax down the distribution chain, rather than having the option to do so. Laws of 1983, 1st Ex. Sess., ch. 49, § 26; *see also,* Laws of 1998, ch. 176, § 7. The Colville and Yakama tribes sued the State, arguing that the fuel tax was being imposed unlawfully on sales to tribal members on reservation land because the law required the tax to be passed forward and thus the real incidence of the tax fell on tribal retailers on the reservation. These lawsuits resulted in consent decrees between the State and the two tribes under which the tribes agreed to track fuel sales to members versus nontribal members. In the consent decrees, the State agreed to repay the tribes the amount of fuel taxes paid on fuel purchased by tribal members from on-

reservation retailers.[3] The tribes would tell the State the number of gallons of fuel sold to tribal members, and the State would calculate the tax refund based on the total number of gallons. *Id.* Pursuant to legislative direction, Laws of 1995, ch. 320, §§ 2, 3, the State entered into agreements with other tribes on a basis akin to the consent decrees.

Shortly after the 1995 fuel tax amendments, the State abandoned the "counting gallons" approach because it required substantial record-keeping requirements and imposed an administrative burden on the tribes, and instead entered into agreements based upon a formula.

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[3] The Yakamas, one of the tribes referenced above, refused to remit to Washington State the fuel taxes they collected. News accounts indicated that the amount withheld was as much as $25 million. http://seattletimes.com/State-Yakama-Nation-agree-on-simpler-fuel-tax-system (Nov. 23, 2013). The State sued the Yakamas to recover the past due taxes. The State settled with the Yakamas for $9 million. Simultaneously, the State entered into an agreement with the Yakamas in which the State collects the fuel tax and remits 75% of the collections to the tribe. The Yakamas agreed to pay the State $9 million but that sum will be paid from the tax revenue the Yakamas received from Washington State.

Under these agreements, the State agreed to disburse fuel tax revenues to the tribes based on the number of enrolled local tribal members, multiplied by the average per capita consumption of fuel statewide, disbursing to the tribes 100% of the fuel tax revenue applicable to this amount of fuel. The State entered into such agreements with numerous tribes.

In 1999, the Washington Legislature changed the point of collection for the fuel tax from distributors to suppliers in order to increase administrative efficiency and to provide greater revenues for the State. Laws of 1998, ch. 176, § 1(3). With respect to the legal incidence of the tax, however, the law still required that the tax to be passed down the distribution chain to retailers and consumers, instead of simply allowing the suppliers to choose whether to pass on the tax. *See, e.g., id.*, §§ 48(1), 81. The Legislature made no changes to the existing

tribal agreements, and the authorization to enter into such agreements remained in place. *See id.*, §§ 48(2), 81. In the early 2000s, the Squaxin and Swinomish tribes sued the State arguing that the tribes were completely immune from Washington's fuel tax, not just for sales of fuel to tribal members but for sales to *all* fuel purchasers on tribal land. They asserted that under the then-existing law,[4] the legal obligation to pay the tax fell on the retail tier of the distribution chain, including tribal retailers. *Squaxin*, 400 F. Supp. 2d at 1251. The tribes argued that because there was no consumer-level enforcement mechanism, and because retailers were not entitled to refunds if consumers failed to pay the tax, the legal incidence of the tax fell on retailers. *Id.* at 1255-57.

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[4] *See* former RCW 82.36.020. However, the law also stated that the ultimate incidence of the tax was intended to fall on consumers. *See* former RCW 82.36.407(1).

Relying on *Chickasaw*, a case in which the legal incidence of a state fuel tax also fell on tribal retailers, the district court in *Squaxin* enjoined the State from collecting fuel taxes on "the Tribes' retail sales of fuel products on Tribal land." *Id.* at 1262.[5] Because the State was not permitted to tax tribes for transactions on tribal land, the court concluded that Washington fuel taxes, the legal incidence of which fell on tribal retailers, were illegal. *Id.*

In December 2006, this Court issued its decision in *Wagnon*, upholding Kansas' fuel tax because the tax was explicitly imposed on off-reservation sales to distributors and did not require those distributors to pass the tax

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[5] In reaching its ruling, the *Squaxin* court noted that Washington's fuel tax (at that time) was legally required to be passed down the distribution chain to retailers. *See Squaxin*, 400 F. Supp. 2d at 1252-53. Suppliers and distributors would "simply collect and remit the funds" and would be "reimbursed for any deficiency." *Id.* at 1252. In contrast, retailers were not legally required to pass the fuel tax on to consumers, and were not entitled to a refund if a consumer failed to pay the tax. *Id.* at 1252-53.

forward in the distribution chain. *Wagnon*, 546 U.S. at 103. Because the legal incidence of the tax fell off-reservation, the tribes were not immune from the tax simply because it was included by distributors in the price of the fuel they sold on-reservation. *Id.*

In 2007, to remedy the issues raised in the *Squaxin* ruling, Washington shifted the full burden of its fuel tax to suppliers. RCW 82.36.020(1); RCW 82.38.030(1). Under this statute, the legal incidence of Washington's fuel tax now falls expressly on suppliers and is imposed on the first taxable event in Washington. *See* RCW 82.36.010(12), .020(1), .026(5); RCW 82.38.030(1), (7), .035(6). *None* of the activities constituting the first taxable event – removing fuel from a refinery, removing fuel from the terminal rack, importing fuel from another state, or blending fuel – is conducted on any tribal lands. There is no requirement that the cost of the tax be passed down, but suppliers are permitted to include "as a

part of the selling price an amount equal to the tax." RCW 82.36.026.[6]

This 2007 change in Washington law shifted Washington's fuel tax regime from one similar to Oklahoma's in *Chickasaw*, where the legal incidence fell on tribal retailers, to one like Kansas' regime in *Wagnon*, where the legal incidence fell on entities like Cougar Den located off tribal lands.[7]

Cougar Den is a fuel supplier, subject to Washington's fuel tax in the same way any other fuel distributor that bought fuel in another state and brought it into

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[6] The fuel tax is imposed at the first of the following transactions: (1) when fuel is removed from the terminal rack by a supplier and sold to a distributor; (2) when fuel is produced; (3) imported; or (4) blended in the State. RCW 82.36.020(2); *see also*, RCW 82.38.030(7). While the fuel tax is included in the price of fuel sold and delivered to tribal fuel retailers, the legal incidence of the tax is placed on suppliers (who are non-Indian) and the taxable event arises off reservation.

[7] Washington consolidated its treatment of gasoline and diesel fuels into a single code chapter. Laws of 2013, ch. 225; Laws of 2015, ch. 228, § 40. That statutory change, effective in 2016, does not apply to the events in this case.

Washington for distribution would be subject to taxation. The legal incidence of Washington's fuel tax as to Cougar Den occurs off-reservation.[8]

(2) **The Washington Supreme Court Decision Is Contrary to Ninth Circuit Precedent Interpreting Travel Rights in Indian Treaties**

WOMA/WANS concur in Washington State's argument that review is merited here because the opinion of the Washington Supreme Court is entirely contrary to the

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[8] The record indicates that Cougar Den is a private wholesale fuel company owned by Richard "Kip" Ramsey, a Yakama tribal member. It never applied for or held any type of fuel license from Washington State in order to acquire gasoline or diesel fuel wholesale, although it obtained an Oregon fuel dealer's license in 2012, using that license to purchase gasoline and diesel wholesale in Oregon. It avoids Oregon fuel taxes because it exports that fuel. ORS 319.240.

In March 2013, Cougar Den began exporting fuel from Oregon into Washington. It contracted with a trucking company, KAG West, to pick up its fuel in Oregon and transport it into Washington. Cougar Den then imported millions of gallons of fuel in 2013 without paying Washington taxes.

Cougar Den provided more than 90 percent of its fuel to two gas stations called Wolf Den and Kiles Korner in Wapato, Washington. Wolf Den and Kiles Korner sell retail fuel to the general public. Cougar Den provided the remainder of the fuel to businesses owned by Ramsey in White Swan, Washington. Before April 2013, these retailers purchased fuel from Washington-licensed fuel suppliers who paid Washington fuel taxes.

long-standing interpretation by the Ninth Circuit of identical treaty travel provisions. That court misconstrued the plain language of the Yakama treaty to find a "right to trade" that was *nowhere* to be found in the treaty language, contravening this Court's long-standing emphasis in *Chocktaw Nation of Indians v. U.S.*, 318 U.S. 423, 432 (1943); *Nw. Bands of Shoshone Indians v. U.S.*, 324 U.S. 335, 353 (1945) on the enforcement of plain treaty language as written. *See, e.g., Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1019 (Wash. 2017) ("We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce."). Review is merited in this case under Rule 10(b) because the decision of the Washington Supreme Court on the interpretation of an important provision in an Indian treaty conflicts with decisions of

the United States Court of Appeals for the Ninth Circuit on the same point.

Simply put, there is no right to trade in the treaty at issue. Yakama tribal members had the right to travel on public highways like any other citizens, free of specific fees for such rights; no such fee was imposed here.[9]

The Washington court's analysis cannot be squared with Ninth Circuit precedent *rejecting* it.[10] In particular, the Ninth Circuit rejected the analogous argument in

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[9] As noted *supra*, Washington imposes a tax on wholesale fuel when it enters the state or is removed from a bulk facility in the state, and the person taxes is the fuel owner. RCW 82.36.010(16), 82.38.020(26), 82.36.020(2), and 82.38.030(7). The agency's final order specifically found that the tax is "not a charge for Cougar Den's use of public highways. ... Cougar Den is being taxed for importing fuel." Final Order CL 20.

[10] Indeed, apart from a different product being at issue, the facts in *King Mountain* and this case are essentially identical. King Mountain Tobacco Co. was owned by an enrolled Yakama tribal member. It initially bought tobacco in North Carolina and processed it there. It then brought the processed product back to Washington State where it was then sold on the reservation and throughout the state and 16 others. King Mountain asserted it was exempt from a Washington State health-related assessment pursuant to a Master Settlement Agreement between the states and tobacco manufacturers, or, alternatively, a tax in lieu of that assessment. 768 F.3d at 991-92.

interpreting the *same provision* of the *identical treaty* in *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015). In addressing article III of the treaty, the Ninth Circuit stated: "As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* at 996. That court further concluded "the Treaty is not an express federal law that exempts King Mountain from state economic regulations" and "there is no right to trade in the Yakama Treaty." *Id.* at 997, 998.

The *King Mountain* court's analysis flowed from a number of prior Ninth Circuit decisions analyzing the very same provision of the very same treaty. *See Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) (trucking license fees were subject to Yakama treaty); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (truck license and overweight

fees subject to Yakama treaty); *Ramsey v. U.S.*, 302 F.3d 1074, 1080 (9th Cir. 2002) (upholding federal diesel fuel tax from Yakama treaty challenge).

The Washington court also misread the Ninth Circuit opinion in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). *Smiskin* does not aid Cougar Den's position. In *Smiskin*, a criminal prosecution for trafficking in illegal cigarettes, the Ninth Circuit held that a pre-transport notice requirement for moving cigarettes was a condition on travel that was inconsistent with article III of the Yakama treaty, 487 F.3d at 1264-66, relying on its earlier rulings in the *Cree* cases that the treaty preempted state truck license fees. No such travel-related fee is at issue here. Moreover, the *Smiskin* court *nowhere* recognized a broad-based right to travel as did the Washington court. *See also, United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008).

Review of the Washington Supreme Court opinion is merited under Rule 10(b).

(3) The Washington Supreme Court Decision Is Contrary to This Court's Precedent on Taxation of Tribal Activity Off-Reservation

This Court should also grant review in this case under Rule 10(c) as the Washington court has decided an important point of federal Native American law in a way conflicting with this Court's decisions. The Washington court not only misapplied this Court's treaty interpretation principles, as noted *supra*, it failed to heed a cardinal principle of this Court's Native American treaty jurisprudence that tribal members acting outside of the reservation are subject to the very same taxation obligations as are nontribal citizens of a state. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache*

Tribe, supra at 148-49. Again, the *very same treaty* has been interpreted by this Court to support this analysis. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), this Court also rejected the notion that a Yakama tribal concern could sell cigarettes free of Washington State taxation, stating that a "State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Id.* at 151.[11]

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[11] In *Colville*, federally licensed Native American traders engaged in on-reservation sales, predominantly to nontribal members, of cigarettes supplied by several Washington tribes. The tribes imposed a tax largely on cigarette purchasers. Washington State also imposed a tax on cigarette purchasers. The low sale price of untaxed cigarettes was the only reason purchasers journeyed to the reservation. If the Washington tax were collected, on-reservation cigarette purchases by nontribal members would end. The tribes argued that while both the tribe and Washington State had an interest in taxing to raise revenue, federal law supporting tribal self-determination and economic development preempted the State's interest. This Court rejected both arguments.

This Court held that the State could tax cigarette sales by a tribe to non-Indians and nonmember Indians even though sales to tribal members were not taxable by the State and the tribe imposed its own tax. *Id.* at 155-56, 160-61. The state taxes were not preempted by federal law and did not interfere with tribal self-government. *Id.* at 155-56. The State could legitimately seize cigarettes off-

Left unaddressed, the Washington court's decision contravenes this Court's *Mescalero Apache Tribe* decision, and exempts tribal members from state tax law in the guise of interpreting a federal treaty that merely secured for Yakama tribal members a right to "travel upon all public highways" in common with citizens of the United States. The Washington court's decision not only forestalls state taxation of Cougar Den's importation of wholesale fuel, it will have a profound impact on a variety of state tax regimes and will provide a huge competitive disadvantage to competitors of tribal businesses who would enjoy tax exempt status. News accounts of this case have indicated that favored retailers enjoyed a 20 cent per gallon advantage over other retailers when Washington State's fuel tax was at 37.5 cents per

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reservation that failed to meet Washington State taxation requirements. *Id.* at 161-62.

gallon.[12] That tax rate increased since the time of the proceedings below.

WOMA's members who purchased fuel in Oregon would have to obtain a fuel importer license, and pay Washington's fuel tax. Cougar Den, and any other similarly situated tribal fuel importer,[13] would not. WOMA members would be competitively disadvantaged. State fuel tax revenues devoted to highway maintenance

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[12] http://www.yakimaherald.com/ news/ local/ gas- tax- fuels- debate-between-yakama-nation-state/article_8a9006b8-0116-11e5-b9b1-d75098f93ec7.html; http://www. yakimaherald.com/news/ business/local/does-state-gas-tax-apply-on-yakama-reservation-judge-will/article_425f31a2-2ddf-11e5-9941-3fff12e36503.html; http://www.yakimaherald.com/news/crime_and_courts/judge-s-ruling-expected-to-favor-treaty-rights-in-gas/article_866c7922-30c8-11e5-b81c-d7d4d9013cea.html.

[13] The incentive for other tribal fuel importers and other wholesalers to enter this market is patent. This is not a theoretical concern. The Nez Perce tribe has a similar treaty provision. 392 P.3d at 1024 n.11. Indeed, as the Washington court dissent noted: "A simple extension of the majority's logic would allow *nontribal members* to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members." *Id.* (emphasis in original) (Fairhurst, J., dissenting). Tribal governments in Washington already benefit from compacts paying them a share of fuel tax revenues. *See AUTO, supra.* An integrated tribal fuel importer/wholesaler/retailer operation would put nontribal fuel operations out of business.

and construction would also suffer. Wash. Const. art. II, § 40; RCW 46.48.070 (prescribing that fuel tax revenues must be placed in a dedicated motor vehicle fund and appropriated only for transportation purposes.

Similarly, WANS would be disadvantaged in tobacco sales. Tribal businesses could circumvent Washington State's high tobacco taxes, running afoul of contrary Ninth Circuit precedent.[14]

Review of the Washington Supreme Court decision is merited under Rule 10(c).

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[14] *E.g., King Mountain*, 768 F.3d at 998 (state cigarette escrow payments); *U.S. v. King Mountain Tobacco Co., Inc.*, 2015 WL 4523642 (E.D. Wash. 2015) (federal tobacco assessments); *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *rev'd*, 843 F.3d 810 (9th Cir. 2016); *Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010), *aff'd*, 658 F.3d 1078 (9th Cir. 2011). *See also*, *Matheson v. Wash. State Liquor Control Bd.*, 130 P.3d 897 (Wash. App.), *review denied*, 158 Wn.2d 1023 (Wash. 2006) (upholding state cigarette excise tax on unlicensed Native American retailer selling cigarettes to other tribes).

F. CONCLUSION

The Washington Supreme Court's extreme interpretation of the Yakama treaty should be reversed. It will effectively blow gaping holes in the fuel tax revenues and transportation budgets of the states. It will allow tribal fuel suppliers an unfair advantage over nontribal business competitors, and create a precedent for tribal retailers of other products that this Court should not countenance.

DATED this 17th day of July, 2017.

Respectfully submitted,

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No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE, 14, 2017
CERTIORARI GRANTED JUNE 25, 2018

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STATE OF WASHINGTON

YAKIMA COUNTY SUPERIOR COURT

COUGAR DEN, INC., a Yakama Nation corporation, Petitioner, v. STATE OF WASHINGTON DEPARTMENT OF LICENSING, Respondent.	NO. 14-2-03851-7 AGENCY RECORD, CERTIFICATE OF AGENCY RECORD AND INDEX

I, Paul Johnson, the undersigned Administrator, hereby certify that the following record contains all the matters considered in the administrative proceeding for the above-entitled matter.

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Dated this *14* day of *January*, 2015.

DEPARTMENT OF LICENSING
BUSINESS AND PROFESSIONS DIVISION

s/ Paul Johnson
Paul Johnson
Program Manager

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
Prorate and Fuel Tax, Fuel Tax Unit
PO Box 9228 • Olympia, Washington 98507-9228

December 9, 2013

Kip Ramsey
Cougar Den, Incorporated
620 Signal Peak Road
White Swan, Washington 98952

Assessment Number: 756M

Dear Mr. Ramsey:

Importing fuel without a license

We received reports from Oregon Department of Transportation, Fuels Tax Group, showing your company imported fuel to Washington from Oregon in March through October 2013. These imports are subject to Washington taxes under chapters 82.36 and 82.38 of the Revised Code of Washington (RCW). The current amount owing is $3,639,954.61, including tax, penalties, and interest. Please review the following chart for a breakdown of the tax, penalty, and interest owed:

Special Fuel (SF) (RCW 82.38)

2013	Gallons	Tax (RCW 82.38.030)	Penalty (RCW 82.38.170)
March	23,157	$8,683.88	$868.39
April	163,344	$61,254.00	$6,125.40
May	195,661	$73,372.88	$7,337.29
June	321,623	$120,608.63	$12,060.86
July	295,101	$110,662.88	$11,066.29
August	320,669	$120,250.88	$12,025.09
September	360,579	$135,217.13	$13,521.71
October	351,606	$131,852.25	$13,185.23

[chart cont'd]

Unlicensed Imports Penalty	Interest (RCW 82.38.170)	Total
Not applicable	$894.91	$10,447.18
Not applicable	$5,582.83	$72,962.23
Not applicable	$5,882.04	$86,532.21
Not applicable	$8,161.84	$140,831.33
Not applicable	$6,209.41	$127,938.58
Not applicable	$5,370.94	$137,646.91
Not applicable	$4,506.93	$153,245.77
Not applicable	$2,915.25	$147,952.73
	SF Total	$877,556.94

Motor Vehicle Fuel (MF) (RCW 82.36)

2013	Gallons	Tax (RCW 82.36.025)	Penalty (RCW 82.36.040)
March	18,501	$6,937.88	$138.76
April	304,199	$114,074.63	$2,281.49
May	320,652	$120,244.50	$2,408.89
June	529,753	$198,657.38	$3,973.15
July	537,547	$201,580.13	$4,031.60
August	602,136	$225,801.00	$4,516.02
September	540,516	$202,693.50	$4,053.87
October	594,464	$222,924.00	$4,458.48

[chart cont'd]

Unlicensed Imports Penalty (RCW 82.36.080)	Interest (RCW 82.36.045)	Total
$6,937.88	$1,466.23	$15,480.74
$114,074.63	$21,587.96	$252,018.70
$120,244.50	$20,125.39	$263,019.28
$198,657.38	$28,947.05	$430,234.95
$201,580.13	$25,050.50	$432,242.35
$225,801.00	$23,266.60	$479,384.62
$202,693.50	$16,624.94	$426,065.81
$222,924.00	$13,644.74	$463,951.22
	MF Total	**$2,762,397.67**
	Total Assessment	**$3,639,954.61**

What you must do

Within 30 days of the receipt date of this letter, you must either:

- pay this assessment, or
- submit a written appeal or request for reassessment

Payment Instructions

Send payment, via electronic funds transfer to the Department of Licensing. Follow the instructions below to complete your EFT wire or ACH transfer:

Bank Name:	Bank of America
Branch:	Olympia, Washington
Name of Bank Account:	Washington State Treasurer – Concentration Account
Checking Account Number:	105000000604
Telegraphic Abbreviation:	Bank of America
ACH Transit Routing Number:	123308825
Wire Transit Routing Number:	026009593
Comment/Message:	Assessment 756M

After 30 days, an additional 10 percent late payment penalty is added to the taxes due, unless payment is received. On the first of each month, 1 percent interest is applied to the unpaid balance.

Licensing Requirements

Per Washington State law and the 2013 "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington," Paragraph 4.3b, you must be properly licensed as an importer to continue importing fuel. Therefore, I have enclosed the required application materials.

Appeal Instructions

If you decide to appeal this assessment, mail your explanation or reason for appeal or reassessment to:

Fuel Tax Section
Department of Licensing
Post Office Box 9228
Olympia, Washington 98507-9228

The procedures that apply to appeals are described in sections 308-72-930 and 308-77-102 of the Washington Administrative Code (WAC). The Revised Code of Washington and the Washington Administrative Code are available online at: http://www.leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx.

If we do not hear from you within 30 days, this assessment becomes final and closed to further appeal.

Questions

Contact Ann Diaz at (360) 664-1853 or email adiaz@dol.wa.gov.

Respectfully,

s/ Paul W. Johnson
Paul W. Johnson
Fuel Tax Manager
Prorate and Fuel Tax Services

cc Thao Manikhoth, Administrator - Prorate and Fuel Tax Services
Compliance Unit
Fuel Tax Unit

Enclosures

STOKES LAWRENCE
VELIKANJE MOORE & SHORE

Andre M. Penalver
(509) 895-0096
Andre.Penalver@stokeslaw.com

Reply to Yakima Office

January 3, 2014

Fuel Tax Section Department of Licensing
P.O. Box 9228
Olympia, WA 98507-9228

Re: Assessment Number: 756M Letter of Appeal

To Whom This May Concern:

This letter is an appeal of the December 9, 2013 notice of assessment that the Department of Licensing ("the Department") sent to Kip Ramsey and Cougar Den, Inc.

After our review of the matter, we conclude that Mr. Ramsey and Cougar Den, Inc. owe no taxes, penalties or interest because Mr. Ramsey never imported fuel within the meaning of the statutes. Separately, Mr. Ramsey is not subject to a state fuel tax because he is a member of the Yakama Nation. For these same reasons, Mr. Ramsey has no obligation to get a fuel importing license.

A. Kip Ramsey Never Imported Fuel to Washington.

The Department asserts that Mr. Ramsey and Cougar Den are subject to taxes under Chapters 82.36 and 82.38 RCW because they allegedly "imported fuel to Washington from Oregon in March through October

2013." Mr. Ramsey and Cougar Den have indeed imported fuel from Oregon, but they transported this fuel from Oregon onto the ceded lands of the Yakama Nation. At no point did Mr. Ramsey's trucks cross into the state of Washington. As such, Mr. Ramsey never imported fuel into the state of Washington within the meaning of the statutes:

- "Import" means to bring motor vehicle fuel *into this state* by a means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.36.010(10) (emphasis added).
- "Import" means to bring special fuel *into this state* by a means of conveyance other than the fuel supply tank of a motor vehicle. RCW 82.38.020(12) (emphasis added).

Absent any imports into the state of Washington, Chapters 82.36 and 82.38 RCW do not apply, and the Department of Licensing has no basis for imposing any tax.

B. As a Member of the Yakama Nation, Mr. Ramsey Is Immune from a State Fuel Tax.

Even assuming that Mr. Ramsey's trucks crossed onto the state of Washington, the state has no authority to tax Mr. Ramsey. It is settled law that the state has no authority to impose a fuel tax on fuel sold on tribal land:

> We hold that Oklahoma may not apply its motor fuels tax, as currently designed, to fuel sold by the Tribe in Indian country. In so holding, we adhere to settled law: when Congress does not instruct otherwise, a State's

> excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.

Oklahoma Tax Com'n v. Chickasaw Nation, 515 U.S. 450, 453, 115 S. Ct. 2214 (1995). Such a tax "conflicts with the traditional scope of Indian sovereign authority." *Id.* at 454. Finally, it is preempted by the federal government, which has "exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985); *accord* Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Wash. Const. art. XXVI, § 2 ("Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .").

The Department's position is indistinguishable from that of Oklahoma in the *Chickasaw Nation* case: it seeks to impose a motor fuel tax on Mr. Ramsey who is in the business of selling fuel on tribal land. Such a tax is unenforceable against Mr. Ramsey and his business, Cougar Den, Inc.

C. Mr. Ramsey Does Not Need a License from the State of Washington to Sell Fuel on Tribal Land.

The Department asserts that Mr. Ramsey "must be properly licensed as an importer to continue importing fuel." But for the same reasons that Mr. Ramsey is not subject to a tax, he is also not subject to any licensing requirement. First, Mr. Ramsey holds an import license with the Yakama Nation into which he imports fuel; as explained above, he has no need for a license from the state of Washington because he does not import fuel into the

state of Washington. Second, the Department's attempt to regulate Mr. Ramsey's business is a violation of tribal sovereign authority and federal preemption. *Chickasaw Nation*, 515 U.S. at 453.

The Department has failed to present any authority for circumventing the long settled sovereignty of the Yakama Nation and the exclusive authority of the federal government. Accordingly, Mr. Ramsey and Cougar Den, Inc. owe no taxes, penalties, or interest.

Sincerely yours,

STOKES LAWRENCE
VELIKANJE MOORE & SHORE

s/ Andre M. Penalver

Andre M. Penalver
Attorney for Mr. Ramsey & Cougar Den, Inc.

cc: Kip Ramsey

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
Prorate and Fuel Tax, Fuel Tax Unit
PO Box 9228 • Olympia, Washington 98507-9228

February 19, 2014

Kip Ramsey
Cougar Den, Incorporated
620 Signal Peak Road
White Swan, Washington 98952

Assessment Number: 760M

Dear Mr. Ramsey:

Importing fuel without a license

We received reports from Oregon Department of Transportation, Fuels Tax Group, showing your company imported fuel to Washington from Oregon in November and December 2013. These imports are subject to Washington taxes under chapters 82.36 and 82.38 of the Revised Code of Washington (RCW). The current amount owing is $1,137,337.68, including tax, penalties, and interest. Please review the following chart for a breakdown of the tax, penalty, and interest owed:

Special Fuel (SF) (RCW 82.38)

2013	Gallons	Tax (RCW 82.38.030)	Penalty (RCW 82.38.170)
November	267,232	$100,212.00	$10,021.20
December	284,713	$106,767.38	$10,676.74

[chart cont'd]

Unlicensed Imports Penalty	Interest (RCW 82.38.170)	Total
Not applicable	$3,340.18	$113,573.38
Not applicable	$2,360.63	$119,804.75
	SF Total	**$233,378.13**

Motor Vehicle Fuel (MF) (RCW 82.36)

2013	Gallons	Tax (RCW 82.36.025)	Penalty (RCW 82.36.040)
November	566,181	$212,317.88	$4,246.36
December	586,407	$219,902.63	$4,398.05

[chart cont'd]

Unlicensed Imports Penalty (RCW 82.36.080)	Interest (RCW 82.36.045)	Total
$212,317.88	$17,414.34	$446,296.45
$219,902.63	$13,459.80	$457,663.10
	MF Total	**$903,959.55**
	Total Assessment	**$1,137,337.68**

What you must do

Within 30 days of the receipt date of this letter, you must either:

- pay this assessment, or
- submit a written appeal or request for reassessment

Payment Instructions

Send payment, via electronic funds transfer to the Department of Licensing. Follow the instructions below to complete your EFT wire or ACH transfer:

Bank Name:	Bank of America
Branch:	Olympia, Washington
Name of Bank Account:	Washington State Treasurer – Concentration Account
Checking Account Number:	105000000604
Telegraphic Abbreviation:	Bank of America
ACH Transit Routing Number:	123308825
Wire Transit Routing Number:	026009593
Comment/Message:	Assessment 756M [*sic*]

After 30 days, an additional 10 percent late payment penalty is added to the taxes due, unless payment is received. On the first of each month, 1 percent interest is applied to the unpaid balance.

Licensing Requirements

Per Washington State law and the 2013 "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington," Paragraph 4.3b, you must be properly licensed as an importer to continue importing fuel.

Appeal Instructions

If you decide to appeal this assessment, mail your explanation or reason for appeal or reassessment to:

Fuel Tax Section
Department of Licensing
Post Office Box 9228
Olympia, Washington 98507-9228

The procedures that apply to appeals are described in sections 308-72-930 and 308-77-102 of the Washington Administrative Code (WAC). The Revised Code of Washington and the Washington Administrative Code are available online at: http://www.leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx.

If we do not hear from you within 30 days, this assessment becomes final and closed to further appeal.

Questions

Contact Ann Diaz at (360) 664-1853 or email adiaz@dol.wa.gov.

Respectfully,

s/ Paul W. Johnson
Paul W. Johnson
Fuel Tax Manager
Prorate and Fuel Tax Services

cc Thao Manikhoth, Administrator - Prorate and Fuel Tax Services
Compliance Unit
Fuel Tax Unit

Enclosures

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
Prorate and Fuel Tax, Fuel Tax Unit
PO Box 9228 • Olympia, Washington 98507-9228

April 1, 2014

Kip Ramsey
Cougar Den, Incorporated
620 Signal Peak Road
White Swan, Washington 98952

Assessment Number: 761M

Dear Mr. Ramsey:

Importing fuel without a license

We received reports from Oregon Department of Transportation, Fuels Tax Group, showing your company imported fuel to Washington from Oregon in January and February 2014. These imports are subject to Washington taxes under chapters 82.36 and 82.38 of the Revised Code of Washington (RCW). The current amount owing is $1,129,701.25, including tax, penalties, and interest. Please review the following chart for a breakdown of the tax, penalty, and interest owed:

Special Fuel (SF) (RCW 82.38)

2014	Gallons	Tax	Penalty
January	315,640	$118,365.00	$11,836.50
February	271,946	$101,979.75	$10,197.98

[chart cont'd]

Unlicensed Imports Penalty	Interest	Total
Not applicable	$3,945.25	$134,146.75
Not applicable	$2,254.78	$114,432.51
	SF Total	**$248,579.26**

Motor Fuel (MF) (RCW 82.36)

2014	Gallons	Tax	Penalty
January	617,986	$231,744.75	$4,634.90
February	504,822	$189,308.25	$3,786.17

[chart cont'd]

Unlicensed Imports Penalty	Interest	Total
$231,744.75	$19,007.73	$487,132.13
$189,308.25	$11,587.19	$393,989.86
	MF Total	**$881,121.99**
	Total Assessment	**$1,129,701.25**

What you must do

Within 30 days of the receipt date of this letter, you must either:

- pay this assessment, or
- submit a written appeal or request for reassessment

Payment Instructions

Send payment, via electronic funds transfer to the Department of Licensing. Follow the instructions below to complete your EFT wire or ACH transfer:

Bank Name:	Bank of America
Branch:	Olympia, Washington
Name of Bank Account:	Washington State Treasurer – Concentration Account
Checking Account Number:	105000000604
Telegraphic Abbreviation:	Bank of America
ACH Transit Routing Number:	123308825
Wire Transit Routing Number:	026009593
Comment/Message:	Assessment 756M [*sic*]

After 30 days, an additional 10 percent late payment penalty is added to the taxes due, unless payment is received. On the first of each month, 1 percent interest is applied to the unpaid balance.

Licensing Requirements

Per Washington State law and the 2013 "Fuel Tax Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington," Paragraph 4.3b, you must be properly licensed as an importer to continue importing fuel.

Appeal Instructions

If you decide to appeal this assessment, mail your explanation or reason for appeal or reassessment to:

Fuel Tax Section
Department of Licensing
Post Office Box 9228
Olympia, Washington 98507-9228

The procedures that apply to appeals are described in sections 308-72-930 and 308-77-102 of the Washington Administrative Code (WAC). The Revised Code of Washington and the Washington Administrative Code are available online at: http://www.leg.wa.gov/LawsAndAgencyRules/Pages/default.aspx.

If we do not hear from you within 30 days, this assessment becomes final and closed to further appeal.

Questions

Contact Ann Diaz at (360) 664-1853 or email adiaz@dol.wa.gov.

Respectfully,

s/ Paul W. Johnson
Paul W. Johnson
Fuel Tax Manager
Prorate and Fuel Tax Services

cc Thao Manikhoth, Administrator - Prorate and Fuel Tax Services
Compliance Unit
Fuel Tax Unit

Enclosures

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LICENSING

In re the Matter of Fuel Tax or Prorate Assessment Issued to, COUGAR DEN, INC., Respondent.	Case No.: 2014-DOL-0006 Agency No. 756M DECLARATION OF KIP RAMSEY III

I, Kip Ramsey III, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I am the Chief Operating Officer for Ramsey Companies, which includes Cougar Den, Inc., the Respondent in this case.

2. Cougar Den, Inc. was established in 1992 as a way to provide fuel to members of the Yakama Nation. Its business is to distribute fuel and to operate a restaurant, also called Cougar Den, located at 620 Signal Peak Rd., White Swan.

3. Around March 20, 2013, Cougar Den began importing from Oregon in keeping with its role as an agent of the Yakama Nation for the purpose of procuring petroleum products. Cougar Den hauls the fuel from Oregon across Biggs Junction to the Yakama Reservation, staying at all times in Oregon, the Ceded Area of the Yakama Nation, or the Reservation itself.

4. Each month, Cougar Den has reported all its gallons of Oregon fuel with the Oregon Department of Transportation.

5. In order to transport the fuel from Oregon, Cougar Den uses its own trucks. It has also contracted with KAG West to carry the fuel in KAG West's trucks at Cougar Den's direction and as Cougar Den's agent.

6. It is important to Cougar Den that we distribute fuel to members of the Yakama Nation only. For that reason, when Cougar Den sells fuel to a business, its invoice includes the enrollment number of the individual who owns the business. I have attached true and correct copies of examples of such invoices. As described in the invoices, federal and tribal taxes are paid on each sale.

7. Sometime around December 9, 2013, Cougar Den received Assessment 756M for taxes, penalties, and interest that the State of Washington claimed was owing. This was the first notice that the State of Washington had sent to Cougar Den for any importation taxes or licensing requirements for Cougar Den's Oregon fuel.

8. As a member of the Yakama Nation, I am a member of the General Council of the Yakama Nation. The General Council includes all enrolled adult members of the Yakama Nation.

9. On March 13, 2014, I was present when the General Council considered and rejected the 2013 Fuel Tax Agreement between the Yakama Nation and the State of Washington. The General Council has not yet prepared a written resolution reflecting that vote, but such a written resolution is forthcoming.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at White Swan, Yakama Nation Reservation, this *7th* day of April, 2014.

s/ Kip Ramsey III
Kip Ramsey III

ATTACHMENT A

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002472-IN
Invoice Date: 4/28/2013
Salesperson:
Tax Schedule:

Delbert Wheeler
Yakama Enrollment # 5777
2421 W Wapato Rd.
Wapato, WA 98951

Customer Number: 00-KK
Customer P.O.: 4/28 PM
Ship VIA:
Terms: NO TERMS

Contact:

Item Code	Description	UM	Quantity	Price	Amount
0 Unlead	All others		11,308.000	2.895	32,736.66
0 Federal Taxes and Fees	All others		11,308.000	0.186	2,103.29
0 Tribal Taxes	All others		11,308.000	0.055	621.94
0 Delivery	All others		11,308.000	0.095	1,074.26

Net Invoice:	36,536.15
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	36,536.15

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002518-IN
Invoice Date: 6/15/2013
Salesperson:
Tax Schedule:

Kip Ramsey III
Yakama Enrollment 10825
61 W Wapato Rd.
Wapato, WA 98951

Customer Number: 76-WOLFDEN
Customer P.O.: 6/15 Delivery
Ship VIA:
Terms: NO TERMS

Contact:

Item Code	Description	UM	Quantity	Price	Amount
0 Unleaded	All others		6,400.000	2.941	18,822.40
0 Diesel	All others		3,999.000	2.996	11,981.00
0 Federal Diesel Tax	All others		3,999.000	0.246	983.75
0 Federal Unleaded Tax	All others		6,400.000	0.186	1,190.40
0 Tribal Tax	All others		10,399.000	0.055	571.95
0 Unleaded Delivery Fee	All others		6,400.000	0.096	614.40
0 Diesel Delivery Fee	All others		3,999.000	0.106	423.89

Net Invoice:	34,587.79
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	34,587.79

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002615-IN
Invoice Date: 7/13/2013
Salesperson:
Tax Schedule:

Kip Ramsey III
Yakama Enrollment 10825
61 W. Wapato Rd.
Wapato, WA 98951

Customer Number: 76-WOLFDEN
Customer P.O.: 7/13 Delivery
Ship VIA:
Terms: NO TERMS

Contact:

Item Code	Description	UM	Quantity	Price	Amount
0 Unleaded	All others		6,004.000	3.158	18,960.63
0 Diesel	All others		2,899.000	3.042	8,818.76
0 Federal Diesel Tax	All others		2,899.000	0.246	713.15
0 Federal Unleaded Tax	All others		6,004.000	0.186	1,116.74
0 Tribal Tax	All others		8,903.000	0.055	489.67
0 Diesel Delivery Fee	All others		2,899.000	0.106	307.29
0 Unleaded Delivery Fee	All others		6,004.000	0.096	576.38

Net Invoice:	30,982.62
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	30,982.62

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002675-IN
Invoice Date: 8/6/2013
Salesperson:
Tax Schedule:

Kip Ramsey
Yakama Enrollment 2161
PO Box 458
61 Medicine Valley Rd.
White Swan, WA 98952

Contact: Kip Ramsey

Customer Number: 75-TIINMAF
Customer P.O.: 8/5 Delivery
Ship VIA:
Terms: Net 30

Item Code	Description	UM	Quantity	Price	Amount
0 B5 bio diesel	All others		6,201.000	3.090	19,161.09
0 Dyed B5 bio diesel	All others		3,500.000	3.095	10,832.50
0 Federal diesel tax	All others		6,200.000	0.246	1,525.20
0 Federal diesel tax	All others		3,500.000	0.003	10.50
0 Tribal Tax	All others		9,701.000	0.055	533.56
0 Delivery Fee	All others		9,701.000	0.112	1,086.51

Net Invoice:	33,149.36
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	33,149.36

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002784-IN
Invoice Date: 9/10/2013
Salesperson:
Tax Schedule:

Delbert Wheeler
Yakama Enrollment # 5777
2421 W Wapato Rd.
Wapato, WA 98951

Customer Number: 00-KK
Customer P.O.: 9/10 Delivery
Ship VIA:
Terms: NO TERMS

Contact:

Item Code	Description	UM	Quantity	Price	Amount
0 Unleaded	All others		9,822.000	2.910	28,582.02
0 Premium	All others		1,605.000	3.190	5,119.95
0 Federal tax	All others		11,427.000	0.186	2,125.42
0 Tribal tax	All others		11,427.000	0.055	628.49
0 Delivery Fee	All others		11,427.000	0.096	1,096.99

Net Invoice:	37,552.87
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	37,552.87

INVOICE

Cougar Den, Inc.
620 Signal Peak Rd.
PO BOX 669
White Swan, WA 98952
(509) 874-2090

Invoice Number: 0002942-IN
Invoice Date: 10/24/2013
Salesperson:
Tax Schedule:

Kip Ramsey
Yakama Enrollment 2161
PO Box 458
61 Medicine Valley Rd.
White Swan, WA 98952

Contact: Kip Ramsey

Customer Number: 75-TIINMAF
Customer P.O.: 10/24 Delivery
Ship VIA:
Terms: Net 30

Item Code	Description	UM	Quantity	Price	Amount
0 Diesel	All others		5,500.000	3.073	16,901.50
0 Dyed Diesels	All others		4,000.000	3.078	12,312.00
0 Federal diesel tax	All others		5,500.000	0.246	1,353.00
0 Federal dyed diesel tax	All others		4,000.000	0.003	12.00
0 Tribal tax	All others		9,500.000	0.055	522.50
0 Diesel Delivery fee	All others		9,500.000	0.112	1,064.00

Net Invoice:	32,165.00
Freight:	0.00
Sales Tax:	0.00
Invoice Total:	32,165.00

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR DEPARTMENT OF LICENSING

In the Matter of the Fuel Tax Assessment Issued to: COUGAR DEN, INC., Respondent.	OAH Docket No. 214-DOL-0006 Fuel Tax Asses. No. 756M DECLARATION OF PAUL W. JOHNSON

I, PAUL W. JOHNSON, declare as follows:

1. I am employed by the Washington Department of Licensing (DOL) as a Washington Management Services (WMS) Manager in the Prorate and Fuel Tax Section, Business and Professions Division. I have held that position for fourteen years. In that position, I managed an audit section for five years, and I have managed a fuel tax section for seven years. Since about 2005, my responsibilities have included management of DOL's fuel tax agreements with Indian Tribes. Before I was hired by the Washington Department of Licensing, I held auditor and supervisor positions in the Fuel Tax Audit Section at the Idaho State Tax Commission for over nine years.

2. In my capacity as the Fuel Tax Manager, I work with government officials who are responsible for enforcement of motor fuel tax laws in other states. For example, I work with officials from the Oregon Department of Transportation-Fuels Tax Group. As permitted by law, we cooperate and share information to facilitate the enforcement of our respective states' motor fuel tax laws. The documents that have been

submitted in this matter as Stipulated Exhibit 5 are copies of documents that I received from Jim Bodenhamer of the Oregon Department of Transportation-Fuels Tax Group.

3. Under the 2013 Fuel Tax Agreement between the Yakama Nation and the State of Washington, and under a prior federal court Consent Decree between the Yakama Nation and the State, the Yakama Nation informed the Department of Licensing which businesses held tribal permits to operate retail gas stations within the Yakama Reservation. The Yakama Nation provided copies of the permits to the Prorate and Fuel Tax Section of DOL. Attached as Exhibit 1 are copies of all of the Yakama Nation Petroleum Permits that the Yakama Nation sent to the Prorate and Fuel Tax Section between November 2012 and November 2013. The Yakama Nation also provided information about the names and addresses of the businesses that held these permits, as follows:

NAME	ADDRESS
Cougar Den	620 Signal Peak Road White Swan, WA
Kiles Korner	2421 West Wapato Road Wapato, WA
Lillies Corner	50 West Wapato Road Wapato, WA
Mountain Inn	105 East Main Street Glenwood, WA

Topp Mart	907 West First Avenue Toppenish, WA
Topp Stop	321 Elm Street Toppenish, WA
White Swan Trading Post	180 Birch Street White Swan, WA
Wolf Den	61 West Wapato Road Wapato, WA
Yakamart	111 Fort Road Toppenish, WA

4. The gas stations that hold Yakama Nation Petroleum Permits are not the only gas stations within the Yakama Reservation. There are other gas stations in Toppenish and Wapato.

5. Under the old Consent Decree between the Yakama Nation and the State, Washington-licensed fuel suppliers could obtain a partial refund of the state fuel tax they had paid on fuel they sold to fuel retailers that held Yakama Nation Petroleum Permits. The suppliers submitted refund claims documenting those sales to the Prorate and Fuel Tax Section, and DOL paid refunds based on the information on the forms. DOL stopped providing such refunds to fuel suppliers when the 2013 Fuel Tax Agreement between the Yakama Nation and the State of Washington took effect on November 22, 2013.

6. I used the refund claim forms that Washington-licensed fuel distributors and fuel tax returns used by licensed suppliers submitted to DOL

in 2013 to prepare the tables attached as Exhibit 2. Table A shows the sales to the Yakamart that WSCO Petroleum Corporation reported for the period of March through October 2013. WSCO Petroleum holds a Washington Motor Vehicle Fuel Distributor license and a Washington Special Fuel Distributor license. Table B shows the sales to Cougar Den, Wolf Den, and Kiles Korner that R.E. Powell and IPC (USA) Inc. reported for the 2013 calendar year. Table B also shows the sales to Cougar Den, Wolf Den, and Kiles Korner that Cougar Den reported to the Oregon Department of Transportation in the reports I received from the Oregon Department of Transportation for the same period. R.E. Powell holds a Washington Motor Vehicle Fuel Supplier license and a Washington Special Fuel Supplier license. IPC (USA) Inc. holds a Washington Motor Vehicle Fuel Supplier license and a Washington Special Fuel Supplier license. The Schedules of Disbursements that I received from the Oregon Department of Transportation for August 2013 appear to be incomplete, so I estimated the amount of fuel that Cougar Den sold to Wolf Den and Kiles Korner for that month.

7. The fuel terminal "racks" that are closest to the Yakama Reservation are located in Pasco, Washington.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this *24* day of April, 2014 at Olympia, Washington.

s/ Paul W. Johnson
Paul W. Johnson

In re Cougar Den, Inc.
OAH Docket No. 2014-DOL-0006
Fuel Tax Assessment No. 756M

Declaration of Paul W. Johnson

Exhibit 1

Yakama Nation Petroleum Permits
Provided to Washington Department of Licensing
Prorate and Fuel Tax Section
between November 2012 and November 2013

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Cougar Den, Inc.

Is granted the privilege of selling/utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
December 02, 2012 to December 02, 2013

s/ Virgil Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 10-12 Kip Ramsey

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Kiles Korner

Is granted the privilege of selling/utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
December 14, 2012 to December 14, 2013

s/ Richard George
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 12-12 Delbert Wheeler Sr.

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Da Store @ Lillies Corner

Is granted the privilege of utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
November 28, 2012 to November 28, 2013

s/ Gerald Læwis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 08-12 Theresa & E. Arlen Washines

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Mountain Inn, LLC

Is granted the privilege of selling/utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
November 17, 2012 to November 17, 2013

s/ Virgil Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 11-12 Billie & Shane Patterson

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Grey Poplars Inc. DBA
Toppmart Chevron

Is granted the privilege of selling/utilizing/using
petroleum on the trust property described within,

Provided that compliance is maintained with the
laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
July 23, 2013 to July 23, 2014

s/ Gerald Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 06-13 Ty Young

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Grey Poplars Inc. DBA
Toppstop Texaco

Is granted the privilege of selling/utilizing/using
petroleum on the trust property described within,

Provided that compliance is maintained with the
laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
July 23, 2013 to July 23, 2014

s/ Gerald Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 05-13 Ty Young

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Grey Poplars Inc. DBA
White Swan Trading Post

Is granted the privilege of selling/utilizing/using
petroleum on the trust property described within,

Provided that compliance is maintained with the
laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
July 23, 2013 to July 23, 2014

s/ Gerald Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 07-13 Ty Young

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Lupine Inc. DBA Wolf Den

Is granted the privilege of selling/utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
December 02, 2012 to December 02, 2013

s/ Virgil Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 09-12 Dacie Ramsey

YAKAMA NATION
TOPPENISH, WA
PETROLEUM PERMIT
NON-TRANSFERABLE

This is to certify that Yakamart

Is granted the privilege of selling/utilizing/using petroleum on the trust property described within,

Provided that compliance is maintained with the laws of the YAKAMA NATION

Including,
YAKAMA NATION COUNCIL RESOLUTIONS
T-144-88 & T-38-89.
Petroleum Permit is valid from
May 21, 2013 to May 21, 2014

s/ Virgil Lewis
YAKAMA TRIBAL COUNCIL
LAW & ORDER COMMITTEE
CHAIR OR MEMBER

License No. YNP 04-13 Yakama Nation

LICENSING

TABLE A

Prorate and Fuel Tax

Fuel Deliveries to Yakamart

March 1, thru October 31, 2013

	Gallons		
2013	**Gas**	**Diesel**	**Total Gallons**
MAR	227,213	139,812	367,025
APR	220,821	148,695	369,516
MAY	183,612	141,224	324,836
JUN	257,625	137,428	395,053
JUL	245,731	119,428	365,159
AUG	303,626	123,145	426,771
SEP	239,829	140,721	380,550
OCT	342,837	179,837	522,674
Totals	**2,021,294**	**1,130,290**	**3,151,584**

Source: WSCO - Licensed Distributor Refund Claim Forms

Gallons subject to change per amended information

Effective date 4/14/14

dL LICENSING

TABLE B

Prorate and Fuel Tax
Fuel Deliveries
January 1, thru December 31, 2013

Motor Fuel Gallons Fuel Purchases:

	Cougar Den (Owner - Kip Ramsey)				Wolf Den (Owner - Kip Ramsey)		
2013	RE Powell	Oregon Imports	IPC (USA) Inc.	Total Gallons	RE Powell	Oregon Imports	Total Gallons
Jan	26,501			26,501	290,793		290,793
Feb	38,196			38,196	304,939		304,939
Mar	15,735	18,501		34,236	317,368		317,368
Apr		Per Tax Ret:	11,104	11,104	32,902		32,902
		Per OR rtn:	60,219	60,219			-
		38,212		38,212		229,776	229,776
May		19,902		19,902		177,941	177,941
Jun		34,515		34,515		316,980	316,980
Jul		35,511		35,511		309,643	309,643
Aug		34,131		34,131		420,447	420,447
Sep		37,013		37,013		318,994	318,994
Oct		39,175		39,175		345,772	345,772
Nov		36,711		36,711		340,149	340,149
Dec		44,214		44,214		349,989	349,989
Totals	80,432	337,885	71,323	489,640	946,002	2,809,691	3,755,693

Kiles Korner (Owner - Delbert Wheeler)			Total Gallons
RE Powell	Oregon Imports	Total Gallons	
156,187		156,187	473,481
134,956		134,956	478,091
169,109		169,109	520,713
101,001		101,001	364,418
	36,211	36,211	
22,796	122,809	145,605	343,448
	178,258	178,258	529,753
	192,393	192,393	537,547
	147,558	147,558	602,136
	184,509	184,509	540,516
	209,517	209,517	594,464
	189,321	189,321	566,181
	192,204	192,204	586,407
584,049	1,452,780	2,036,829	6,282,162

August 2013 Gallons Received by
Wolf Den and Kiles Korner Estimated

TABLE B cont'd

Special Fuel Gallons Fuel Purchases:

	Cougar Den (Owner - Kip Ramsey)				Wolf Den (Owner - Kip Ramsey)		
2013	RE Powell	Oregon Imports	IPC (USA) Inc.	Total Gallons	RE Powell	Oregon Imports	Total Gallons
Jan	5,201			5,201	185,174		185,174
Feb	9,008			9,008	164,484		164,484
Mar		3,501		3,501	221,581	19,656	241,237
Apr		5,602	11,104	16,706		157,742	157,742
May	1,850	2,200		4,050		173,408	173,408
Jun		8,099		8,099		254,173	254,173
Jul		8,001		8,001		218,190	218,190
Aug		8,301		8,301		267,576	267,576
Sep		12,120		12,120		255,142	255,142
Oct		15,900		15,900		248,301	248,301
Nov		6,999		6,999		192,009	192,009
Dec		6,301		6,301		220,207	220,207
Totals	16,059	77,024	11,104	104,187	571,239	2,006,404	2,577,643

Kiles Korner (Owner - Delbert Wheeler)			Total Gallons
RE Powell	Oregon Imports	Total Gallons	
88,651		88,651	279,026
39,862		39,862	213,354
39,004		39,004	283,742
		-	174,448
	20,053	20,053	197,511
	49,551	49,551	311,823
	49,105	49,105	275,296
	44,792	44,792	320,669
	74,012	74,012	341,274
	68,303	68,303	332,504
	48,808	48,808	247,816
	48,504	48,504	275,012
167,517	403,128	570,645	3,252,475

August 2013 Gallons Received by Wolf Den and Kiles Korner Estimated

Total 2013 Fuel Purchases:	Motor Fuel	6,282,162
	Special Fuel	3,252,475
	Motor & Special Fuel	9,534,637

Sources: Fuel Tax Licensee Tax Returns
Cougar Den Oregon Export Returns

Gallons subject to change per amended information

Excerpted from Agency Record at 215-59

(Excerpt from Cases Attached to Respondent's Motion for Summary Judgment, *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1261-67 (1997))

* * * * *

[Agency Record 216]

United States District Court,
E.D. Washington.

YAKAMA INDIAN NATION, Plaintiff/Intervenors,
v.
Juan FLORES, et al., Defendants.
Ronald CREE, Jr., et al., Plaintiffs,
v.
Juan FLORES, et al., Defendants.
WHEELER LOGGING, Plaintiff,
v.
Annette SANDBERG, et al., Defendants,
v.
Federico PENA, United States Secretary of Transportation, Third Party Defendant.

Nos. CS-89-458-AAM, CY-92-3100-AAM.
Feb. 12, 1997.

* * * * *

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. Since 1915, Washington has required registration and licensing of trucks according to gross weight, with higher weights bearing higher licensing

fees. RCW §§ 46.16.070, 46.16.135. Trucks owned by individual Indians have never been exempt from such license fees.

2. Washington requires log tolerance permits for certain overweight trucks with payment of an accompanying fee. RCW §§ 46.44.047, 46.44.095. Individual Indians have never been exempt from such fees.

3. Washington law establishes traffic infractions for violations of the weight licensing requirements, and impose penalties for such violations. RCW §§ 46.16.010, 46.16.135, 46.16.140, 46.16.145. Fees paid to the State of Washington for truck registration, licensing, and log tolerance permits are credited to the state motor fund and used primarily for highway purposes. RCW §§ 46.68.030, 46.68.035.

4. Plaintiff-Intervenor Yakama Nation sells timber from lands held in trust by the United States for the benefit of the Yakama Nation and its members. Under the supervision of the Bureau of Indian Affairs, the Yakama Nation enters into timber sales contracts with purchasers. When possible, purchasers of tribal timber must employ tribal members. Ramsey testimony.

5. Plaintiff Richard "Kip" Ramsey, d/b/a Tiin-Ma Logging, and Delbert Wheeler, d/b/a Wheeler Logging, own logging trucks. Both Mr. Ramsey and Mr. Wheeler are enrolled Yakama Indians. Employed by purchasers of tribal timber, their companies haul timber for the purchasers to various sites designated by the purchasers. Some sites to which the timber is delivered is outside of reservation boundaries. When

they haul timber, Tiin-Ma and Wheeler trucks operate on public highways at gross weights exceeding 55,000 pounds. P–54; Ramsey testimony.

6. While Ramsey and Wheeler principally haul tribal timber to the Boise Cascade mill in Yakima, they also haul timber to mills on the Columbia River, in Packwood, Washington, and occasionally to mills in the State of Oregon. Drivers for Ramsey and Wheeler travel on roads within the reservation the majority of the time.

7. Both Ramsey and Wheeler engage in hauling logs at all times of the year when weather permits.

8. Defendants are the Chief of the Washington State Patrol (WSP) and Commercial Vehicle Enforcement Officers of the WSP authorized to enforce vehicle licensing laws and other state laws pertaining to highway use.

9. Defendant officers issued traffic citations to Tiin-Ma and Wheeler Logging drivers because Kip Ramsey and Delbert Wheeler neither paid applicable tonnage licensing fees nor obtained log tolerance permits for their trucks. Recently, defendant officers began issuing citations

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to Tiin-Ma and Wheeler drivers for the failure to possess proper registration. All of the state enforcement actions challenged in this case happened outside the boundaries of the Yakama Indian Reservation.

10. Under the laws of the State of Washington Yakama tribal members could not license their

vehicles without paying the State registration and licensing fees. Testimony of Kip Ramsey; P–54.

11. Kip Ramsey and Wheeler Logging Company cannot license their logging trucks or secure tonnage and log tolerance permits without payment of State licensing, registration and tonnage fees. Testimony of Kip Ramsey; P–54.

12. Since the inception of State laws requiring vehicle licenses and fees, the State has enforced those laws by citing Yakama Indian vehicle owners who do not license or register their vehicles.

13. The State of Washington no longer cites Yakama Tribal members for traffic infractions inside reservation boundaries. This exemption includes vehicles which are neither licensed or registered by the State.

14. Criminal and "infraction" enforcement of licensing and registration laws of the State of Washington prevent the *Cree* and *Wheeler* plaintiffs herein from obtaining licenses, registrations, and tonnage permits for their trucks without first paying state licensing, and tonnage fees. Testimony of Kip Ramsey; P–54.

15. Plaintiffs Cree and Wheeler have been subjected to significant fines by the defendants because plaintiffs have not purchased licenses and tonnage permits in compliance with the laws of the State. *See* P–9. Plaintiffs, including the Yakama Nation, contend that the Treaty With the Yakamas of 1855 precludes the state from imposing licensing and tonnage fees against Indian–owned trucks hauling tribal goods to market.

16. *Cree* plaintiffs and Wheeler Logging, including Kip Ramsey and Delbert Wheeler, intend to comply with all State laws designed to "conserve" the public highways and agree to register their trucks with the State of Washington for identification purposes. Ct. Rec. 294.

17. On June 9, 1855, the United States and fourteen Indian tribes and bands entered into a treaty, the Treaty With the Yakamas (Treaty), 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1959). P–1.

18. Article III, paragraph 1 of the Treaty With the Yakamas provides:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.

19. The Yakamas view the Treaty as a sacred document and place special significance to each part of the Treaty as it provides them with basic rights. Yallup testimony at pp. 9–10; Walker testimony at p. 12.

20. The Treaty With the Yakamas must be construed as the Yakamas would have naturally understood the language, with ambiguous phrases construed in their favor. If the Treaty language is unambiguous, it must be construed in accordance

with its plain language, notwithstanding subsequent actions of the parties.

21. Article III, paragraph 1, of the Treaty With the Yakamas, when viewed in its historical context, unambiguously reserves to the Yakamas the right to travel the public highways without restriction.

22. Article III, paragraph 1 of the Treaty provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while en-

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gaged in the transportation of tribal goods.

23. Prior to and at the time the treaty was negotiated, the bands comprising the Yakama Nation engaged in a system of trade and exchange with other plateau tribes as well as with more distant tribes of the Northwest coast and plains of Montana and Wyoming. The Yakamas traveled south to the Willamette Valley and possibly California for trading purposes. The Yakamas also traveled to fish on the Columbia River and its tributaries, to hunt at the "buffalo grounds" and in other regions of the Northwest, and to gather roots and berries in the mountains. P–5; P–14, D–218; P–15, D–344; P–17, D–335; P–21, D–329; Walker testimony at pp. 13–18; Richards testimony at p. 12.

24. The Yakama system of trade and exchange was necessary to obtain goods that were otherwise unavailable to them but important for sustenance and religious purposes, such as buffalo byproducts and

shellfish. Yallup testimony at pp. 12–15, 21–22; Walker testimony at p. 16. Items Yakamas traded included fir trees, lava rocks, horses, and various species of salmon. Yallup testimony at pp. 12–15.

25. The Yakamas also traded with non-Indians, particularly the Hudson's Bay Company, to obtain other goods. P–6–8; P–14, D–218. Walker testimony at 13–18.

26. Bands comprising Yakamas, particularly Klickitats, were well-known for their inherent trading ability. P–14, D–218; P–15, D–344; Walker testimony at p. 16.

27. Travel to other regions was essential for the maintenance of the Yakama way of life. Travel enabled the Yakamas to fish, hunt, gather, trade, and maintain intermarriage cultural ties. The Yakama also obtained fish and other aquatic resources, large and small game, decorative objects, buffalo products, and other items essential to their religious practices and ultimately their survival. P–14, D–218; Yallup testimony at p. 22–24. Walker testimony at pp. 13–14, 17.

28. Subsistence activities of the Yakamas required regular, extensive travel throughout the Plateau and in the neighboring Plains. The Yakamas joined with eastern groups, such as the Nez Perce and Flathead, to journey into the Plains to hunt bison and to trade. Further, the Yakamas traveled to the mountains for hunting, berry and root-gathering. P–14, D–218; P–15, D–344; Walker testimony at p. 17.

29. Travel was especially important to the Yakamas to pursue their fishing practices. The

Yakamas maintained fisheries on the Columbia River and followed salmon runs as they moved through Yakama territory. Fish was, and is, a dominant staple of Yakama life for sustenance, religious, trade, and medicinal purposes. Yallup testimony at pp. 10–12; Walker testimony at pp. 17–20; P–14, D–218.

30. The Yakamas enjoyed free and open access to trade networks in order to maintain their system of trade and exchange. Walker testimony at pp. 13–18; Yallup testimony at p. 22.

31. Prior to the negotiations of the Treaty, Governor Stevens and his subordinates were aware that the Yakamas traded both on the Pacific Coast and traveled to the Columbia River to fish and to the plains to hunt buffalo. They were also aware of the importance of travel and trade to the Yakamas and their way of life. P–2; P–14, D–218; P–15, D–344; Walker testimony at p. 22.

32. At the time of the Treaty the United States did not charge fees for travel on its public highways in the Washington Territory.

33. Yakamas' contact with whites prior to the Treaty resulted in native use of horses and firearms, which had changed their traditional tribal practices with respect to travel and hunting. Richards testimony at p. 9.

34. Yakamas' contact with whites prior to the Treaty was limited to explorers, traders, Catholic missionaries,

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and perhaps some settlers, although few had settled in the Yakima Valley prior to the Treaty

negotiations. Richards testimony at 12–16; P–14, D–218.

35. At the time of Treaty negotiations, Isaac. I. Stevens was the Territorial Governor of the Washington Territory, Superintendent of Indian Affairs for the Washington Territory, and Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to explore the possibility of a transcontinental railroad route. Richards testimony at pp. 23–24; P–14, D–218.

36. Stevens was pressured to quickly negotiate treaties with Eastern Washington tribes in order to free land for settlement and road-building purposes. The Oregon Donation Act, allowing for settlement without extinguishment of Indian title to land, increased the urgency for land. P–23; D–215; D–216, D–334.

37. Additionally, gaining access to the Yakama Reservation for purposes of building a railroad to Puget Sound was of vital importance to the United States and Stevens. P–23; D–216.

38. The United States believed that gaining Yakamas acquiescence to the roads across their reservation was a different and special case. The United States intended this road to be a major thoroughfare to the coast and accordingly was willing to accommodate many of the demands of the Yakamas. P–14, D–218; P–15, D–344; P–23; D–291.

39. Stevens sent Captain George McClellan, Andrew Bolon, and James Doty to meet with the Yakamas. These men explained in general terms the intent of the federal government to treat with the

Yakamas and described the anticipated provisions of the Treaty. P–14, D–218; P–15; D–344; P–17, D–335; P–24, D–348.

40. Statements by Governor Stevens and his employees prior to the Treaty negotiations and the statements of Governor Stevens and General Palmer at the Treaty negotiations reflect the importance to the United States of roads and railroad building across the Yakama Reservation. P–2; P–14, D–218; P–15, D–344; P–16; P–17, D–335; P–23; P–24, D–348.

41. Stevens' representatives found Indians who spoke Chinook jargon to interpret for them with the Yakamas and other Indians during the Treaty negotiations, even though Chinook jargon was not the primary language of any tribe. P–2; P–17, D–335; Walker testimony at pp. 38–40.

42. The Treaty proceedings formally commenced on May 29, 1855, in the Walla Walla Valley in southeastern Washington. In addition to Stevens and General Joel Palmer, Superintendent of Indian Affairs for the Oregon Territory, approximately sixty non-Indians were present. Over 1800 tribal members, including Yakamas, attended. P–2.

43. At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to fish, hunt, and gather, and trade. P–2.

44. Stevens represented to the tribes that entering into a Treaty with the United States would protect the tribes from "bad white men" and enhance their standards of living by providing agricultural equipment and training, blacksmiths, carpentry shops, and schools. P–2 at pp. 39–41, 49, 52–53.

Stevens guaranteed that the terms of a Treaty would be "carried out strictly." P–2 at p. 55.

45. In discussing the purpose for the creation and placement of the Yakama Reservation, Stevens told the assembled Indians:

> I will give briefly the reason for selection [of] these two reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on both reservations. There is plenty of Salmon on these Reservations, there are roots and berries, there is also some game. You will be near the great road and can take

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> your horses and your cattle down the river and to the Sound to market.

P–2 at p. 64.

46. Stevens repeatedly assured the Yakamas that they would be allowed to travel the public roads outside the Reservation "to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market. P–2 at p. 69; *see also* P–2 at pp. 44, 67, 98.

47. Palmer reiterated the statements made by Stevens when he stated: "My Brother has stated that you will be permitted to travel the roads outside the Reservation." P–2 at p. 70. He further commented:

> Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but

> whatever roads we make through your country will not be for injury.

P–2 at p. 71.

48. The statements of General Palmer reflect that in consideration for allowing the Yakamas to travel on the public highways, the United States bargained for the right to run highways and railroads inside the reservation. P–2 at pp. 70–71.

49. General Palmer's statements assured the Yakamas that roads across the reservation would be of no injury to the Tribe. P–2 at p. 71.

50. In reliance on the promises made by Stevens and Palmer, the Yakamas agreed to enter into the Treaty on June 9, 1855.

51. The Minutes of the Treaty proceeding reflect that the issue of highway travel by the Yakamas outside their reservation was broached several times, reflecting the importance of off-reservation travel to the Yakamas.

52. The Minutes of the Treaty proceedings contain no mention of restrictions upon the right of travel on the public highways, nor is there mention of the possible assessment of fees for that travel. P–2.

53. After the Treaty was concluded, the Yakama Indians continued to travel and fish much as they had prior to Treaty negotiations. P–26, D–224; P–30, D–237; P–44, D–250; D–223.

54. The State of Washington did not impose any licensing or vehicle registration fees for road purposes until at least 1905.

55. In 1932, approximately 128 Indian-owned vehicles were licensed pursuant to Washington law. However, it was estimated that on-reservation Indians owned approximately 500 vehicles during that year. P–47, D–451.

56. In 1986, the Yakama Nation Tribal Council enacted a regulation providing for Tribal regulation of member owned vehicles. D–280.

57. The Yakama Nation and its members consistently objected to State schemes of taxation for the purpose of building roads across the Reservation and state financing proposals that would charge the Yakamas. Yallup testimony at pp. 54–55; P–40; P–45, D–450; P–48, D–465.

58. Since the inception of Tiin–Ma Logging's log hauls, plaintiff Kip Ramsey has protested the defendant's registration, licensing and tonnage fee collection system.

59. Individual plaintiffs previously and successfully litigated their Treaty right to travel in state and federal court. P–51; P–52; P–53. In each case, a court found that Washington truck licensing and permitting fees violated plaintiffs' Treaty travel rights.

60. Article III, paragraph 1, secures rather than re-

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stricts the Yakamas' right to travel the public highways "in common with" non-Indians. However, neither the Treaty language nor statements made during the Treaty negotiations define the scope of "in common with." No equivalent of this phrase exists in

Chinook jargon. P–1; P–55; P–56; Walker testimony at p. 24. At best, the Yakamas had a rudimentary understanding of the phrase "in common with."

61. In the Yakama language, the term "in common with" would suggest public use or general use without restriction. Therefore, as the Yakamas understood this term, no impediment would be placed on their right to travel. The most the Indians would have understood, reading the Treaty as a whole and its interpretive Minutes, of the term "in common with" and "public" was that they would share the use of the roads with whites. Walker testimony at 30.

62. Reading of the Treaty language as a whole reflects that the term "public highways" should be read with its common understanding, meaning a road open to all or for common usage.

63. Stevens and his representatives, both prior to and at the Treaty negotiations, clearly indicated that the roads they were discussing with the Indians were "public" roads open to all the settlers. P–2; P–17, D–335 at pp. 4, 7, 11, 14, 15; P–23; P–24, D–348.

64. The term "in common with" in Article III implies that the Indian and non-Indian use will be joint but does not imply that the Indian use will be in any way restricted.

65. Stevens and Palmer promised, and the Indians understood, that the Yakamas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, and extent.

66. Stevens' and Palmer's statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors.

67. The "great roads" referred to by Governor Stevens in the Treaty Minutes included proposed roads across the Yakama Reservation which were intended to provide access to Puget Sound. There was no suggestion that the Yakamas use of them would be restricted in any way. P–2 at pp. 64, 76.

68. The language of Article III of the Treaty reflects the promises made by Stevens and Palmer in the Treaty discussions and guarantees to the Yakamas the right of free use of the public highways. P–1; P–2.

69. The minutes of the Treaty proceedings reflect that unrestricted travel upon the public highways outside reservation boundaries was an issue of significant importance to both the Yakamas and Governor Stevens. P–2.

70. The Minutes of the Treaty proceedings and the language of Article III reflect no restrictions upon the right of the Yakamas to use the public highways, either for traditional practices of fishing, hunting, gathering and trade, or for future economic endeavors. P–1; P–2.

71. The fishery language of Article III, paragraph 2, is identical to the public highway language contained in Article III, paragraph 1. P–1. Nothing appears in the factual record which would

lead the court to interpret the identical public highway language differently than the manner in which the fishery language has been interpreted.

72. In the historical context of the Treaty, including Stevens' mission to free vast amounts of land for settlement as quickly as possible and the Yakamas' reluctance in entering a treaty with the United States, it is unlikely that Stevens intended to restrict the Yakamas travel in any significant manner.

73. No evidence suggests that Stevens communicated an intent to restrict the Yakamas' right to travel for fishing,

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hunting, gathering, and trade purposes. Further, Stevens did not communicate an intention to assimilate Yakamas with non-Indians or otherwise place the Yakamas on "equal footing" with non-Indians.

74. Evidence suggests that Stevens intended to rely upon federal funds for the construction of roads in Washington Territory. D–334.

75. The branding of horses was not a method of "registering" the Yakamas' method of transportation for purposes of State regulation. D–297. Rather, the branding of horses was a means whereby Yakama Indians and others could identify their horses and cattle. The branding of horses by Yakama Indians is not inconsistent with the Yakamas' claim of free travel upon the public highways.

76. No evidence shows that the Yakamas utilized toll roads or ferries prior to the Treaty. Moreover, the Barlow Road toll charge was the exception rather than the rule at the time of the Treaty. Richards testimony at pp. 122.

77. Even if the Yakamas had paid tolls for use of the Barlow Road or ferries, such actions would not be inconsistent with their claimed Treaty right to travel, because payment of such tolls was not within the context of Treaty negotiations.

78. The fact that plaintiffs did not assert a Treaty travel right with respect to hauling tribal goods to market until 1981 does not diminish their claimed right. Individual plaintiffs did not begin hauling goods off-reservation to outside markets until the 1970s.

79. The challenged truck licensing and permitting fees are revenue-raising rather than regulatory in nature. Ct. Rec. 133. The regulatory purpose of these fees can be accomplished without the imposition of fees because plaintiffs maintain they will remain subject to the weight regulations so long as a fee is not imposed. Further, plaintiffs will not contest a fine imposed for violations of the weight regulations.

80. The Treaty right to travel, although secured to the Yakama Indian Nation, can be exercised by its individual members, and any Yakama-owned and operated corporation or business, which is tribally licensed.

81. The Yakama Nation's retained sovereignty under its Treaty includes the right to

regulate the conduct of its members in the exercise of Treaty rights both on and off the Yakama Reservation. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

82. The Yakama Nation's retained sovereignty under the Treaty reserves to it the right to determine what activities its members may exercise off the Reservation.

83. The Yakama Indian Nation has the autonomy to regulate and exercise this right through the use of member and non-member agents or employees. However, the Yakama Nation's sovereign right to regulate the exercise of Treaty rights does not preclude the state's registration requirements for trucks, so long as the licensing and permitting fees are not imposed.

84. The Yakama Indian Nation, its members, any Yakama-owned or operated corporations or business, and any non-members engaged in the exercise of the Yakama Indian Nation's Treaty right to travel must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right to travel on said public roads or highways.

85. The Yakama Nation, its member, any Yakama-owned or operated corporation or business, must comply with state registration requirements solely for identification purposes to the extent that such requirements do not impose a fee or surcharge on the Treaty right to travel.

86. Washington State has no statutory system to pro-rate licensing, registration or tonnage fees to reflect on

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and off reservation use by Indian-owned trucks based on the mileage driven in each jurisdiction.

87. The apportionment system proposed by defendants which allows for purchase of fees only during the time of use of an Indian-owned trucks off-reservation costs the same for a tribal member as it does for a non-Indian who has no exemption for on-reservation use. Therefore, Washington state licensing and permitting fees are not tailored to account for actual off-reservation use by Indian-owned trucks.

88. Plaintiffs possess a special sovereignty interest in hauling tribal goods, derived wholly from reservation resources, to off-reservation markets.

89. Under relevant Supreme Court caselaw, fees imposed on Indian-owned vehicles for the use of state highways must be apportioned to account for actual off-reservation use.

90. The state's registration, licensing, and permitting fees for trucks are not apportioned to account for on-reservation travel, and therefore are preempted by federal law.

* * * * *

TREATY WITH THE YAKAMAS.
JUNE 9, 1855.

Treaty between the United States and the Yakama Nation of Indians. Concluded at Camp Stevens, Walla-Walla Valley, June 9, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: June 9, 1855.

Preamble

WHEREAS a treaty was made and concluded at the Treaty Ground, Camp Stevens, Walla-Walla Valley, on the ninth day of June, in the year one thousand eight hundred and fifty-five, between Isaac I. Stevens, governor, and superintendent of Indian affairs, for the Territory of Washington, on the part of the United States, and the hereinafter named head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederate tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one

nation, under the name of "Yakama," with Kamaiakun as its Head Chief, on behalf of and acting for said bands and tribes, and duly authorized thereto by them ; which treaty is in the words and figures following, to wit :

Contracting parties.

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of " Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

Cession of lands to the United States.

ARTICLE I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to

the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit :

Boundaries.

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise ; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River ; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119° 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians ; thence in a true south course to the forty-seventh (47°) parallel of latitude ; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes ; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same ; thence, in a southesterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Percé tribe of Indians ;

thence down the Snake River to its junction with the Columbia River ; thence up the Columbia River to the "White banks," below the Priest's rapids ; thence westerly to a lake called "La Lac;" thence southerly to a point on the Yakama River called Toh-mah-luke ; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek ; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians ; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers ; thence along the divide between said rivers to the main ridge of the Cascade Mountains ; and thence along said ridge to the place of beginning.

Reservation.

ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit :

Boundaries.

Commencing on the Yakama River, at the mouth of the Attah-nam River ; thence westerly along said Attah-nam River to the forks ; thence along the southern tributary to the Cascade

Mountains ; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers ; thence down said spur to the divide between the waters of said rivers ; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River ; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River ; and thence up the Yakama River to the place of beginning.

Reservation to be set apart, &c. and Indians to settle thereon;

whites not to reside thereon.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation ; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States ; and upon any ground claimed or

occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

Improvements to be paid for by the United States.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money ; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

Roads may be made.

ARTICLE III. *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation ; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them ; as also the right, in

common with citizens of the United States, to travel upon all public highways.

Privileges secured to Indians.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them ; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Payments by the United States ;

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say : sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the

remainder in annuities, as follows : for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856 ; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year ; and for the next five years, four thousand per year.

how to be applied.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

United Stats to establish schools,

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers ; to build two

blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

mechanics' shops,

saw-mill and flouring-mill,

hospital.

Salary to head chief; house, &c

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred

dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief ; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

Kamaiakun is the head chief.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty ; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Reservation may be surveyed into lots, and assigned to individuals or families.

The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots and assigned the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Vol. x. p. 1044.

Annuities not to pay debts of individuals.

ARTICLE VII. The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

Tribes to preserve friendly relations;

ARTICLE VIII. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

to pay for depredations;

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities.

not to make war but in self-defence ;

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

to surrender offenders.

Annuities may be withheld from those who drink ardent spirits.

ARTICLE IX. The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

Wenatshapam fishery reserved.

ARTICLE X. *And provided*, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid

confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

When treaty to take effect.

ARTICLE XI. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Signatures, June 9, 1855.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the under signed head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent. [L.S.]

KAMAIAKUN,	his x mark.	[L.S.]
SKLOOM,	his x mark.	[L.S.]
OWHI,	his x mark.	[L.S.]
TE-COLE-KUN,	his x mark.	[L.S.]
LA-HOOM,	his x mark.	[L.S.]

ME-NI-NOCK,	his x mark.	[L.S.]
ELIT PALMER,	his x mark.	[L.S.]
WISH-OCH-KMPITS,	his x mark.	[L.S.]
KOO-LAT-TOOSE,	his x mark.	[L.S.]
SHEE-AH-COTTE,	his x mark.	[L.S.]
TUCK-QUILLE,	his x mark.	[L.S.]
KA-LOO-AS,	his x mark	[L.S.]
SCHA-NOO-A,	his x mark.	[L.S.]
SLA-KISH,	his x mark.	[L.S.]

Signed and sealed in presence of —
James Doty, *Secretary Of Treaties*,
Mie. Cles. Pandosy, *O.M.T.*,
Wm. C. McKay,
W.H. Tappan, *Sub Indian Agent, W.T.*,
C. Chirouse, *O.M.T.*,
Patrick McKenzie, *Interpreter*,
A.D. Pamburn, *Interpreter*,
Joel Palmer, *Superintendent Indian Affairs, O.T.*,
W.D. Biglow,
A.D. Pamburn, *Interpreter*.

Ratification, March 8, 1859

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same by a resolution in the words and figures following, to wit :

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES,
March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the head chief, chiefs, headmen, and delegates of the Yakama, Palouse, and other confederated tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty, are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, signed 9th June, 1855.

"Attest : "ASBURY DICKINS, *Secretary*."

Proclamation, April 18, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the city of Washington, this eighteenth day of April, in the year of

[SEAL.]

our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN

By the President :
Lewis Cass, *Secretary of State.*

REVISED YAKAMA CODE ch. 30.11 (2009)

CHAPTER 30.11 - LICENSING RULES AND PENALTIES FOR PETROLEUM

30.11.01: EXERCISE OF POWER AND AUTHORITY.

The provisions of this Chapter shall be deemed an exercise of the power and authority delegated to the Yakama Tribal Council by the Yakama General Council (T-38-56) to regulate business.

[Annotation: Enacted by T-38-89]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

30.11.02: LICENSE AND EFFECTIVE DATE.

On and after the 17th day of January 1989, no tribal member shall engage in the sale, or distribution of petroleum products on land under the jurisdiction of the Yakama Nation without first having obtained and being the holder of a valid and sustaining Tribal License, visibly displayed in the place of business. An enrolled Yakama petroleum products retailer may sell to another enrolled Yakama without assessing or collecting state fuel tax and/or excise tax. However, the seller must assess state fuel tax and/or excise taxes in a sale transaction involving a non-Yakama unless the sale transaction is to a person intending to use the petroleum for off-road purposes and is exempt under Washington State law. In such a sales transaction, the seller need not assess state fuel taxes. The Yakama Nation will not regulate the collection of the state fuel tax in otherwise taxable sale transaction.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"; and Effective Date Clarified]

30.11.03: PENALTY PROVISIONS.

Any person who shall violate any of the provisions of this Chapter shall be deemed guilty of a violation of the laws of the Yakama Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and pay a fine of not more than Three Hundred Fifty Dollars ($350) and/or both such fine and imprisonment, and have his license revoked.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

30.11.04: APPLICATION.

The complete application for a Tribal Petroleum Permit under this Chapter shall be made to the Tax Accountant/Revenue Officer, for submission to the Yakama Nation Law and Order Committee for review and recommendation for approval by the Yakama Tribal Council and shall contain the following information:

a. Name, age, date of birth, Yakama enrollment number, Certification of Indian blood.

b. The applicants current residence and information of residence for the past five years.

c. The proposed place of business and the allotment number of said property. And a copy of lease agreement, if applicant is not the land owner.

d. The applicant's financial statement.

e. A copy of a Yakama Nation Business License, which is valid and current.

f. The applicant's employment history for the past five years.

g. A statement as to whether the applicant owns or has interest in trust or restricted lands within the Yakama Reservation and if so, a description of said property.

h. A statement as to whether the applicant has ever been convicted of a felony, filed for bankruptcy, or has a prior violation of any permit privilege with the Yakama Nation.

Any misrepresentations shall be a cause for revocation of the permit application/current permit.

[Annotation: Enacted by T-150-98; Amended by T-053-94; Amended by T-172-99; Amended by Exec. Memo 06-29-1999; & Amended by GC-01-07]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"; Clerical error corrected, "to" added]

30.11.05: LICENSE TO ISSUE.

In determining whether a license shall issue, the Yakama Tribal Council shall take into consideration ownership of the property, location of the place of business and the financial stability, experience, and the existence or lack of a criminal record of the applicant. The owner and operator of the business shall be Yakamas.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added]

30.11.06: LICENSE EXPIRATION AND DISCLOSURES.

A Tribal license to sell petroleum products shall be applied for annually, on or before the 30th day of September. Applicants shall provide at the time of application a notarized statement setting forth income derived from such sales; and further, applicants shall provide the names of all employees and amount of income earned by each. The applicant shall make a full financial disclosure which shall demonstrate financial solvency and demonstrate complete compliance with the Tribal tax requirements.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added]

30.11.07: EXAMINATION.

The applicant shall understand that the Yakama Tribal Council may examine the books and records of the licensees at any time and furthermore, the applicant shall maintain a recording system detailing all expenses, sales and adjustments to his or her inventory, pursuant to the direction of the Tribal Council or its agents.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added]

30.11.08: EMPLOYMENT PREFERENCE.

Licensees shall give Yakamas employment preference but this section shall be in compliance with the Tribal Employment Rights Ordinance.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added]

[Division of Code Revision Comment: The Tribal Employment Rights Ordinance is codified under Title 71]

30.11.09: LICENSE.

The granting of a tribal license pursuant to this Chapter shall authorize the licensee to sell petroleum products to any person. Any violation of this prohibition shall be subject to the penalty provisions

of Section 30.11.03 set forth hereinabove. Membership within the Tribe shall be verified by enrollment card or signed statements of membership.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

30.11.10: ADMINISTRATIVE FEES.

Licensees will pay administrative fee(s) and a tax according to a scaled tax on petroleum products to the Yakama Nation. Licensees pursuant to this Chapter are required to include this tax as part of the cost of the gasoline sold or distributed. The tax scale and tax assessed will be set from time to time by the Executive Committee with appropriate recommendations of the Law and Order Committee. Provide that no tax or administrative fees shall be assessed with regard to sales of petroleum products to non-members upon which state fuel and excise taxes are collected.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; Amended by Exec. Memo 06-29-1999; & Amended by GC-01-07]

[Division of Code Revision Note: New RYC Section Added]

30.11.11: BENEFIT - PETROLEUM.

Licensees, pursuant to this Chapter shall insure that no direct benefit be derived by any person not a member of the Yakama nation as a result of the sale

of petroleum products or other merchandise in conjunction with the business operation authorized by such a license.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

30.11.12: REVENUE - PETROLEUM.

The revenues received by the Yakama Nation as a result of the license fees and fuel tax described hereinabove, shall be a benefit to the health, safety and general welfare of all residents of the Yakama Reservation.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added]

30.11.13: FAILURE TO COMPLY AND EFFECTIVE DATE - PETROLEUM.

Any licensee who fails to comply with the terms of this Chapter shall have his license revoked. Written notification of the grounds for said revocation shall be given at least five days prior to a hearing held before the Law and Order Committee to determine if this Chapter has been violated. This Chapter shall be effective on this 17th day of January 1989.

[Annotation: Enacted by T-38-89]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

30.11.14: ADMINISTRATION.

This Chapter will be administered by the designated Law and Order Committee of the Yakama Nation Tribal Council.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; Amended by Exec. Memo 06-29-1999; & Amended by GC-01-07]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "ordinance" to "Chapter"]

30.11.15: LIABILITY.

The Yakama Nation Tribal Council enacts this Chapter pursuant to its taxing and policy power as a sovereign. The Yakama Nation is not in privity with any applicant. The Yakama Nation will not represent or counsel any applicant who incurs any tortious, statutory, or contractual liability towards a third party.

[Annotation: Enacted by T-38-89; Amended by T-053-94; Amended by T-172-99; & Amended by Exec. Memo 06-29-1999]

[Division of Code Revision Note: New RYC Section Added; and Clarification, "resolution" to "Chapter"]

Confederated Tribes and Bands of the Yakima Indian Nation — Established by the Treaty of June 9, 1855

PETROLEUM PRODUCTS LICENSE RESPONSIBILITIES

WHEREAS, Cougar Den, Inc. is a Yakima Indian owned corporation incorporated by Resolution No. T-48-92 of the Yakima Tribal Council under Revised Yakima Code § 30.05.07 on January 3, 1992, and licensed as a Tribal business on January 21, 1993, and

WHEREAS, Cougar Den, Inc. was issued a Petroleum License pursuant to Resolution No. T-38-89, November 15, 1992, and

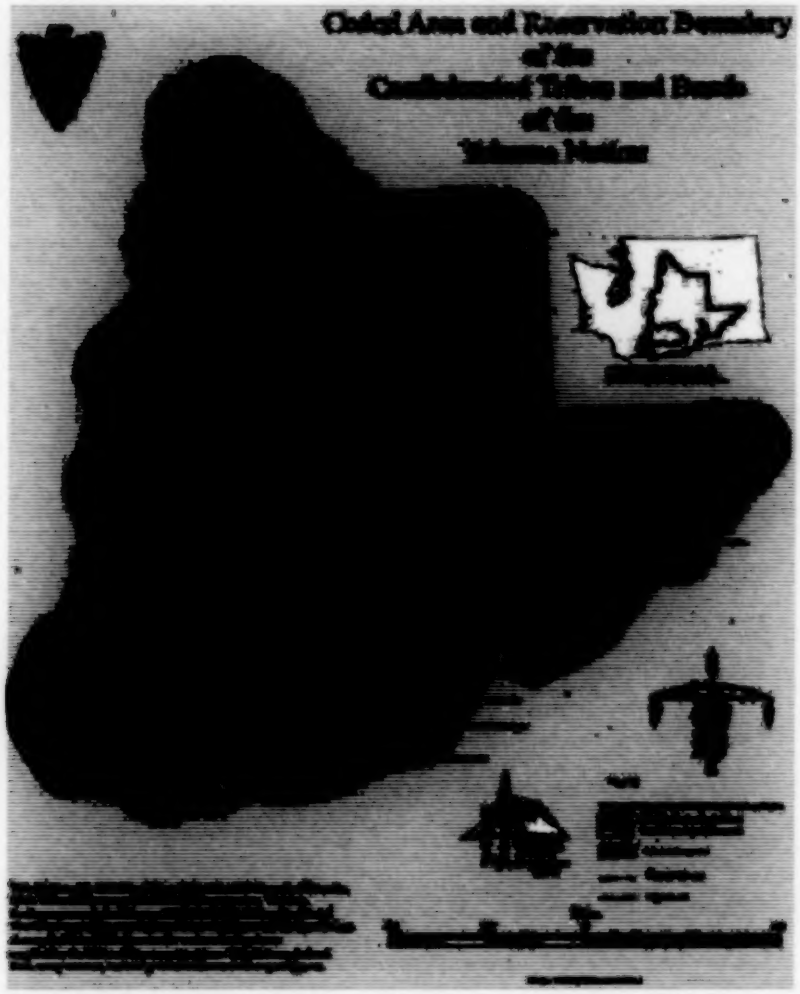
WHEREAS, Yakima Tribal Council Resolution Nos. T-144-88 and T-38-89 require the collection of a petroleum products tax in the amount of $0.55 per gallon of petroleum products sold as a condition of Tribal licensing,

NOW, THEREFORE, I Lonnie Selam, Secretay [*sic*] of the Tribal Council of the Yakima Indian Nation certify that it shall be the responsibility of the said Cougar Den, Inc. to serve as an agent of the Yakima Indian Nation for the purpose of collecting and transmitting Tribal taxes to the Yakima Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to the Yakima Indian Nation and its members. Cougar Den shall obtain no financial interest in such taxes collected.

DONE AND DATED this 29th day of September, 1993.

s/ Lonnie Selam, Sr.
Lonnie Selam, Sr., Secretary
Yakima Tribal Council
Yakima Indian Nation

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121


Ordal Area and Reservation Boundary
of the
Confederated Tribes and Bands
of the
Yakima Nation

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

COUGAR DEN INC., a Yakama Nation corporation, Petitioner, v. DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON, Respondent.	Case No.: 14-2-03851-7 DECLARATION OF HARRY SMISKIN

I, Harry Smiskin, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I am a member of the Yakama Nation. In 2013, I was the Chairman of the Yakama Nation Tribal Council, the governing body that runs the day to day functions of the Yakama Nation.

2. Throughout the year in 2013, the Yakama Nation and the Washington State Department of Licensing met on multiple occasions to mediate a dispute over the collection of fuel taxes.

3. In keeping with Yakama law and custom, any agreement between the Yakama Nation and the Department of Licensing would need to be signed by me and then ratified by the Yakama Nation's General Council, made up of all adult members of the Nation. I signed two agreements, but the General Council rejected those agreements on March 13, 2014.

4. True and correct copies of the two agreements, a Settlement Agreement and Fuel Tax

Agreement Concerning Taxation of Motor Vehicle Fuel and Special Fuel Between the Confederated Tribes and Bands of the Yakama Nation and the State of Washington, are attached as Attachments A and B.

5. During the mediation process, I attended each mediation session as a representative of the Yakama Nation. Pat Kohler, Director of the Department of Licensing, also attended the sessions as the representative of the Department.

6. At issue at the mediation sessions and in our two pending lawsuits (one in Yakama Nation Tribal Court and one in U.S. District Court) was whether the Treaty of 1855 exempted the Yakama Nation from the Department's fuel taxes. The Yakama Nation, which I represented, insisted that Article III of the Treaty preempts the fuel taxes of the Department. On the other side, Ms. Kohler and the Department argued that the Treaty did not apply to taxes on imported fuel, even if the fuel was brought on state roads. I felt like Ms. Kohler and the Department took too narrow a reading of our Treaty.

7. Nonetheless, in an attempt to resolve our dispute and the pending lawsuits, Ms. Kohler and I signed the two agreements. I signed on behalf of the Yakama Nation, and Ms. Kohler signed on behalf of the Department of Licensing. As mentioned, the General Council rejected those agreements on March 13, 2014, and so they never took effect. A true and correct copy of the General Council resolution is attached as Attachment C.

8. While Chairman, I was also present on January 17, 2014 when Governor Inslee signed a proclamation of retrocession, the return of civil and

criminal authority to the Yakama Nation. That proclamation was the result of a 2012 petition by the Yakama Nation that I oversaw as Chairman of the Tribal Council. A true and correct copy of that proclamation is attached as Attachment D.

I declare under penalty of perjury under the laws of the State of Washington (applicable only as to the procedure for submitting this declaration) that the foregoing is true and correct.

EXECUTED at the city of *Wapato, Wa* this *8* day of *January, 2015*.

s/ Harry Smiskin
Harry Smiskin

Confederated Tribes and Bands of the Yakima Indian Nation — Established by the Treaty of June 9, 1855

General Council Memorandum

TO: Yakama Tribal Council Executive Committee
Tribal Council Members
David Shaw, BIA Superintendent

FROM: *s/ Jo Anna Meninick*
Jo Anna Meninick, Chairwoman
Yakama Nation General Council

DATE: April 2, 2014

RE: Notification of Certification of 3rd Set of Current Official General Council Motion/Resolution

This notice of the Yakama Tribal Council serves as a certification of the attached General Council Motion GCM-10-2014 that was passed at the Annual General Council Session on March 13, 2014. Included is the Resolution GC-03-2014.

If you have any further questions regarding this notification please contact my office at ext. 4302.

G.C. Motions	Subject
GCM-10-2014	To reaffirm veto T-002-2014 and to rescind the fuel tax agreement. MOTION PASSED
GC-03-2014	Veto on T-002-2014

Cc: Yakama Tribal Council (14)
Yakama Nation Review

Confederated Tribes and Bands of the Yakima Indian Nation — Established by the Treaty of June 9, 1855

GCM-10-2014

"ANNUAL GENERAL COUNCIL MEETING"

LOCATION: TOPPENISH COMMUNITY CENTER

OFFICIAL COUNT (ENROLLED MEMBERS - 18 YEARS OLD & OVER): 254

DATE: March 13, 2014 TIME: 4:10 P.M.

MOTION MADE BY: Carl George ROLL#5035

I MAKE A MOTION: to reaffirm veto T-002-2014 and to rescind the fuel tax agreement.

SECONDED BY: Jack Fiander ROLL#4261

DISCUSSION: Members spoke on supporting this motion and are concerned if there is a plan set in place.

CALL FOR THE QUESTION: Adrienne Wilson ROLL#604

RESULTS: MOTION PASSED.

VOTE FOR: 210
VOTE AGAINST: 0
ABSTAIN: 44

GENERAL COUNCIL: *s/ Jo Anna Meninick*
Jo Anna Meninick, Chairwoman

ATTEST: *s/ George Selam*
George Selam, Secretary/Treasurer

cc: Tribal Council
Yakama Nation Review

Confederated Tribes and Bands of the Yakima Indian Nation — Established by the Treaty of June 9, 1855

RESOLUTION GC-03-2014

WHEREAS, the Yakama Nation is a federally recognized sovereign pursuant to the Treaty of 1855 (12 Stat. 951) as "Supreme Law of the Land", and

WHEREAS, the General Council is the Supreme Governing body of Fourteen Confederated Tribes and Bands of the Yakama Nation, and

WHEREAS, the General Council pursuant to the provisions of Resolution dated February 18, 1944 and GC-02-81 decides "Matters of Great Importance", and

WHEREAS, the General Council assembly acting in the Annual General Council meeting in Regular Session approved GCM-11-2012 and its accompanying Resolution GC-07-2012 which stated that the Yakama Nation General Council is to exercise authority with regard to any fuel tax related issues in order to "make any decision as needed" on behalf of the Yakama Nation, and

WHEREAS, the Yakama Nation Tribal Court, in case No. C-08-11, R-08-33 (July 28, 2008), has affirmed that No Compact Agreements or similar agreements are deemed valid and enforceable without the State of Washington having first received written verification by Yakama Nation General Council Resolution or other similar valid notification that any such agreements have been approved by the General Council Assembly, with proper notice given as an

agenda item, with a quorum present, vote taken approving any such agreements between the Yakama Nation and the State of Washington, and

WHEREAS, on October 2, 2013 the Tribal Council in chambers voted on and passed Resolution T-002-14 which stated that the Yakama Nation was agreeing to accept a Settlement Agreement and enter into a new Fuel Tax Consent Decree Agreement with the State of Washington without having obtained a Yakama Nation General Council Resolution or other similar valid notification that such Agreement had been approved by the General Council Assembly, and

WHEREAS, on October 7, 2013 the General Council Executive Officers issued by memorandum to the Tribal Council Executive Board official notice that T-002-14 was not to be implemented in any way because it was deemed "Matters of Great Importance", and that a Special Session for General Council meeting was being scheduled for the first week in November for the General Council Body to review and such Agreements, pursuant to GCM-32-94, GCM-11-2012, GC-07-2012, and Case No. C-08-11, R-08-33 (July 28, 2008), and

WHEREAS, on November 7, 2013 by memorandum the General Council Executive Officers issued official notice to the Tribal Council and B.I.A. Superintendent that they had Vetoed T-002-14 in accordance with their Veto Power authority under GCM-32-94, and requested that all parties will comply with the Veto action, and

WHEREAS, on November 18, 2013 in violation of the Tribal Court's decision in Case No. C-08-11, R-08-33 (July 28, 2008) and in violation of the Veto issued

November 7, 2013, the Yakama Nation Tribal Council Chairman together with the fuel task force composed of Tribal Council officials, signed into a Settlement Agreement and Fuel Tax Agreement with the Director of the Washington State Department of Licensing, and

WHEREAS, the Tribal Council's November 18, 2013 Settlement Agreement and Fuel Tax Agreement violates Tribal and Federal Law which states Yakama Nation tribal members are exempt from Washington State fuel taxes, and

WHEREAS, on November 19, 2013 the Yakama Nation General Council sent a letter to the Attorney General of Washington State notifying the state that the Yakama Nation General Council Executive Officers Vetoed the Settlement Agreement and Fuel Tax Agreements because both Agreements were not in the best interest of the Yakama Nation General Council and both Agreements were not in compliance with the Yakama Nation Tribal Laws, and

WHEREAS, on March 13, 2014 the General Council meeting in regular session reviewed and discussed the Settlement Agreement and Fuel Tax Agreement and did not agree to, nor approve of the terms, provisions and conditions of the Agreements negotiated by the Tribal Council and Washington State, and

WHEREAS, on March 13, 2014 the General Council meeting in regular session discussed, voted on and approved GCM-10-2014, to reaffirm the General Council Executive Officers' Veto on Resolution T-002-14, and acted to rescind Tribal Council's November 18, 2013 Settlement Agreement and Fuel Tax Agreement with the State of Washington, and

NOW THEREFORE BE IT RESOLVED, that the Yakama Nation General Council meeting in a regular session, with a quorum being present voted on and approved GCM-10-2014 by a vote of **210** For, **0** Against, **44** Abstain to reaffirm the General Council Executive Officers Veto of T-002-14, and rescinds Yakama Nation Tribal Council's Settlement Agreement and Fuel Tax Consent Agreement with the State of Washington, and

BE IT FINALLY RESOLVED, that the Yakama Nation does not waive, alter, or otherwise diminish or Sovereign Immunity whether expressed or implied by enacting this resolution, nor does the Yakama Nation waive, alter or otherwise diminish the rights, privileges, remedies or services guaranteed by the Treaty of 1855.

DONE AND DATED THIS 21st day of March 2014 by the Yakama Nation General Council in regular session at the Toppenish Community Center.

s/ Jo Anna Meninick,
Jo Anna Meninick, Chairwoman
Yakama Nation General Council

ATTEST:

s/ George Selam
George Selam, Secretary/Treasurer
Yakama Nation General Council

PROCLAMATION BY THE GOVERNOR 14-01

WHEREAS, on March 19, 2012, Governor Christine Gregoire signed Engrossed Substitute House Bill 2233, "Creating a procedure for the state's retrocession of civil and criminal jurisdiction over Indian tribes and Indian country"; and

WHEREAS, Engrossed Substitute House Bill 2233, which became Chapter 48, Laws of 2012, creates a process by which the state of Washington (hereafter, "the State") may retrocede to the United States all or part of the civil and criminal jurisdiction previously acquired by the State over a federally recognized Indian tribe, and the Indian country of such tribe, under federal Public Law 280, Act of August 15, 1953; and

WHEREAS, on March 13, 1963, in accordance with federal Public Law 280, Act of August 15, 1953, the State assumed partial civil and criminal jurisdiction, subject to the limitations in RCW 37.12.021 and RCW 37.12.060, within the Indian country of the Confederated Tribes and Bands of the Yakama Nation (hereafter, "Yakama Nation") pursuant to Chapter 36, Laws of 1963; and

WHEREAS, after March 13, 1963, the Yakama Nation did not invoke with the State the provision of RCW 37.12.021 but chose to rely upon the rights and

remedies of its Treaty of 1855 with the United States, 12 Stat. 951 and federal laws; and

WHEREAS, on January 11, 1980, the Assistant Secretary-Indian Affairs, United States Department of the Interior, approved the Yakama Nation's petition for re-assumption of jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978. Effective March 28, 1980, the Yakama Nation reassumed jurisdiction over Yakama Indian child custody proceedings; and

WHEREAS, on July 17, 2012, the Yakama Nation filed a retrocession petition with the Office of the Governor. The retrocession petition by the Yakama Nation requests full retrocession of civil and criminal jurisdiction on all of Yakama Nation Indian country and in five areas of RCW 37.12.010, including: Compulsory School Attendance; Public Assistance; Domestic Relations; Juvenile Delinquency; and Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways; and

WHEREAS, Governor Gregoire convened government-to-government meetings with the Yakama Nation to discuss the Nation's retrocession petition. In the course of those meetings, the Yakama Nation and Governor Gregoire confirmed that the Yakama Nation asks the State to retrocede all jurisdiction assumed pursuant to RCW 37.12.010 in 1963 over the Indian country of the Yakama Nation, both within and without the external boundaries of the Yakama Reservation. However, the Yakama Nation requests that the State retain jurisdiction over mental illness as provided in RCW 37.12.010(4), and jurisdiction over civil commitment of sexually violent predators

under RCW 71.09, and acknowledges that the State would retain criminal jurisdiction over non-Indian defendants; and

WHEREAS, Governor Jay Inslee convened further government-to-government meetings between the State and Yakama Nation. The Governor's Office has also consulted with elected officials from the jurisdictions proximately located to the Yakama Nation's Indian country; and

WHEREAS, on July 9, 2013, Governor Inslee exercised the six-month extension provision for issuing a proclamation, pursuant to RCW 37.12.160; and

WHEREAS, strengthening the sovereignty and independence of the federally recognized Indian tribes within Washington State is an important priority for the State; and

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the authority vested in me by Section 37.12.160 of the Revised Code of Washington, do hereby grant in part, and deny in part, the retrocession petition submitted by the Confederated Tribes and Bands of the Yakama Nation, according to the following provisions:

1. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede full civil and criminal jurisdiction in the following subject areas of RCW 37.12.010: Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency.
2. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil

and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.

3. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims.

4. Jurisdiction over Indian child custody proceedings under RCW 37.12.010(3) and Adoption proceedings and Dependent Children pursuant to RCW 37.12.010(6) and (7), which the Yakama Nation reassumed in 1980 under the Indian Child Welfare Act, shall remain under the exclusive jurisdiction of the Yakama Nation.

5. Outside the exterior boundaries of the Yakama Reservation, the State does not retrocede jurisdiction. The State shall retain all jurisdiction it assumed pursuant to RCW 37.12.010 in 1963 over the Yakama Nation's Indian country outside the Yakama Reservation.

6. Nothing herein shall affect the State's civil jurisdiction over the civil commitment of sexually violent predators pursuant to chapter 71.09 RCW and the State must retain such jurisdiction

notwithstanding the completion of the retrocession process authorized under RCW 37.12.160.

7. Pursuant to RCW 37.12.010, the State shall retain all jurisdiction not specifically retroceded herein within the Indian country of the Yakama Nation.

8. This Proclamation does not affect, foreclose, or limit the Governor's authority to act on future requests for retrocession under RCW 37.12.160.

Signed and sealed with the official seal of the state of Washington this 17th day of January, A.D. Two-thousand and Fourteen, at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

Excerpts from Washington Revised Code
chapter 82.36 – Motor Vehicle Fuel Tax (2012)

(Chapter 82.36 was merged into chapter 82.38 effective July 1, 2016. *See* 2013 Wash. Sess. Laws page no. 1322 (ch. 225); 2015 Wash. Sess. Laws page no. 1178 (ch. 228, § 40)).

82.36.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

* * * * *

(3) "Bulk transfer" means a transfer of motor vehicle fuel by pipeline or vessel.

(4) "Bulk transfer-terminal system" means the motor vehicle fuel distribution system consisting of refineries, pipelines, vessels, and terminals. Motor vehicle fuel in a refinery, pipeline, vessel, or terminal is in the bulk transfer-terminal system. Motor vehicle fuel in the fuel tank of an engine, motor vehicle, or in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system.

(5) "Department" means the department of licensing.

(6) "Director" means the director of licensing.

* * * * *

(9) "Highway" means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel.

(10) "Import" means to bring motor vehicle fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

* * * * *

(12) "Licensee" means a person holding a motor vehicle fuel supplier, motor vehicle fuel importer, motor vehicle fuel exporter, motor vehicle fuel blender, motor vehicle distributor, or international fuel tax agreement license issued under this chapter.

* * * * *

(14) "Motor vehicle fuel distributor" means a person who acquires motor vehicle fuel from a supplier, distributor, or licensee for subsequent sale and distribution.

* * * * *

(16) "Motor vehicle fuel importer" means a person who imports motor vehicle fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, the person for whom the agent is acting is the importer. If there is no importer of record, the owner of the motor vehicle fuel at the time of importation is the importer.

(17) "Motor vehicle fuel supplier" means a person who holds a federal certificate of registry that is issued under the internal revenue code and authorizes the person to enter into federal tax-free transactions on motor vehicle fuel in the bulk transfer-terminal system.

(18) "Motor vehicle" means a self-propelled vehicle designed for operation upon land utilizing motor vehicle fuel as the means of propulsion.

(19) "Motor vehicle fuel" means gasoline and any other inflammable gas or liquid, by whatsoever name the gasoline, gas, or liquid may be known or sold, the chief use of which is as fuel for the propulsion of motor vehicles or motorboats.

(20) "Person" means a natural person, fiduciary, association, or corporation. The term "person" as applied to an association means and includes the partners or members thereof, and as applied to corporations, the officers thereof.

* * * * *

(22) "Rack" means a mechanism for delivering motor vehicle fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer.

* * * * *

(24) "Removal" means a physical transfer of motor vehicle fuel other than by evaporation, loss, or destruction.

(25) "Terminal" means a motor vehicle fuel storage and distribution facility that has been assigned a terminal control number by the internal revenue service, is supplied by pipeline or vessel, and from which reportable motor vehicle fuel is removed at a rack.

* * * * *

82.36.020 Tax levied and imposed—Rate to be computed—Incidence—Distribution. (1) There is hereby levied and imposed upon motor vehicle fuel licensees, other than motor vehicle fuel distributors, a tax at the rate computed in the manner provided in RCW 82.36.025 on each gallon of motor vehicle fuel.

(2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:

(a) Motor vehicle fuel is removed in this state from a terminal if the motor vehicle fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;

(b) Motor vehicle fuel is removed in this state from a refinery if either of the following applies:

(i) The removal is by bulk transfer and the refiner or the owner of the motor vehicle fuel immediately before the removal is not a licensee; or

(ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;

(c) Motor vehicle fuel enters into this state if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

(d) Motor vehicle fuel is sold or removed in this state to an unlicensed entity unless there was a prior taxable removal, entry, or sale of the motor vehicle fuel;

(e) Blended motor vehicle fuel is removed or sold in this state by the blender of the fuel. The number of gallons of blended motor vehicle fuel subject to the tax is the difference between the total number of gallons of blended motor vehicle fuel removed or sold and the number of gallons of previously taxed motor vehicle fuel used to produce the blended motor vehicle fuel;

(f) Motor vehicle fuel is sold by a licensed motor vehicle fuel supplier to a motor vehicle fuel distributor, motor vehicle fuel importer, motor vehicle fuel blender, or international fuel tax agreement licensee and the motor vehicle fuel is not removed from the bulk transfer-terminal system.

(3) The proceeds of the motor vehicle fuel excise tax shall be distributed as provided in RCW 46.68.090.

82.36.022 Tax imposed—Intent. It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by RCW 82.36.020 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

* * * * *

82.36.026 Tax liability—General. (1) A licensed supplier shall be liable for and pay tax to the department as provided in RCW 82.36.020. On a two-party exchange, or buy-sell agreement between two licensed suppliers, the receiving exchange partner or buyer shall be liable for and pay the tax.

(2) A refiner shall be liable for and pay tax to the department on motor vehicle fuel removed from a refinery as provided in RCW 82.36.020(2)(b).

(3) A licensed importer shall be liable for and pay tax to the department on motor vehicle fuel imported into this state as provided in RCW 82.36.020(2)(c).

(4) A licensed blender shall be liable for and pay tax to the department on the removal or sale of blended motor vehicle fuel as provided in RCW 82.36.020(2)(e).

(5) Nothing in this chapter shall prohibit the licensee liable for payment of the tax under this chapter from including as a part of the selling price an amount equal to the tax.

* * * * *

82.36.035 Computation and payment of tax—Remittance—Electronic funds transfer. (1) The tax imposed by this chapter shall be computed by multiplying the tax rate per gallon provided in this chapter by the number of gallons of motor vehicle fuel subject to the motor vehicle fuel tax.

* * * * *

82.36.045 Licensees, persons acting as licensees—Tax reports—Deficiencies, failure to file, fraudulent filings, misappropriation, or conversion—Penalties, liability—Mitigation—Reassessment petition, hearing—Notice.

* * * * *

(2) If a licensee, or person acting as such, fails, neglects, or refuses to file a motor vehicle fuel tax report the department shall, on the basis of information available to it, determine the tax liability of the licensee or person for the period during which no report was filed. The department shall add the penalty provided in subsection (1) of this section to the tax. An assessment made by the department under this subsection or subsection (1) of this section is presumed to be correct. In any case, where the validity of the assessment is questioned, the burden is on the person who challenges the assessment to establish by a fair preponderance of evidence that it is erroneous or excessive, as the case may be.

* * * * *

82.36.100 Tax required of persons not classed as licensees—Duties—Procedure—Distribution of proceeds—Penalties—Enforcement. Every person other than a licensee who acquires any motor vehicle fuel within this state upon which payment of tax is required under the provisions of this chapter, or imports such motor vehicle fuel into this state and sells, distributes, or in any manner uses it in this state shall, if the tax has not been paid, apply for a license to carry on such activities, comply with all the provisions of this chapter, and pay an excise tax at the rate computed in

the manner provided in RCW 82.36.025 for each gallon thereof so sold, distributed, or used during the fiscal year for which such rate is applicable. The proceeds of the tax imposed by this section shall be distributed in the manner provided for the distribution of the motor vehicle fuel excise tax in RCW 82.36.020. For failure to comply with this chapter such person is subject to the same penalties imposed upon licensees. The director shall pursue against such persons the same procedure and remedies for audits, adjustments, collection, and enforcement of this chapter as is provided with respect to licensees. Nothing in this section may be construed as classifying such persons as licensees.

* * * * *

82.36.230 Exemptions—Imports, exports, federal sales—Invoice—Certificate—Reporting. The provisions of this chapter requiring the payment of taxes do not apply to motor vehicle fuel imported into the state in interstate or foreign commerce and intended to be sold while in interstate or foreign commerce, nor to motor vehicle fuel exported from this state by a licensee . . . .

. . . For the purposes of this section, motor vehicle fuel distributed to a federally recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state.

* * * * *

Excerpts from Washington Revised Code chapter 82.38 – Special Fuel Tax Act (2012)

(Chapter 82.38 was amended to cover motor vehicle fuel as well as special fuel effective July 1, 2016. *See* 2013 Wash. Sess. Laws page no. 1322 (ch. 225); 2015 Wash. Sess. Laws page no. 1178 (ch. 228, § 40)).

* * * * *

82.38.020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

* * * * *

(4) "Bulk transfer-terminal system" means the special fuel distribution system consisting of refineries, pipelines, vessels, and terminals. Special fuel in a refinery, pipeline, vessel, or terminal is in the bulk transfer-terminal system. Special fuel in the fuel tank of an engine, motor vehicle, or in a railcar, trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer-terminal system.

(5) "Bulk transfer" means a transfer of special fuel by pipeline or vessel.

(6) "Bulk storage" means the placing of special fuel into a receptacle other than the fuel supply tank of a motor vehicle.

(7) "Department" means the department of licensing.

* * * * *

(11) "Highway" means every way or place open to the use of the public, as a matter of right, for the purpose of vehicular travel.

(12) "Import" means to bring special fuel into this state by a means of conveyance other than the fuel supply tank of a motor vehicle.

* * * * *

(15) "Licensee" means a person holding a license issued under this chapter.

(16) "Motor vehicle" means a self-propelled vehicle designed for operation upon land utilizing special fuel as the means of propulsion.

* * * * *

(18) "Person" means a natural person, fiduciary, association, or corporation. The term "person" as applied to an association means and includes the partners or members thereof, and as applied to corporations, the officers thereof.

* * * * *

(20) "Rack" means a mechanism for delivering special fuel from a refinery or terminal into a truck, trailer, railcar, or other means of nonbulk transfer.

* * * * *

(22) "Removal" means a physical transfer of special fuel other than by evaporation, loss, or destruction.

(23) "Special fuel" means and includes all combustible gases and liquids suitable for the generation of power for propulsion of motor vehicles, except that it does not include motor vehicle fuel as

defined in chapter 82.36 RCW, nor does it include dyed special fuel as defined by federal regulations, unless the use is in violation of this chapter. . . .

(24) "Special fuel distributor" means a person who acquires special fuel from a supplier, distributor, or licensee for subsequent sale and distribution.

* * * * *

(26) "Special fuel importer" means a person who imports special fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, the person for whom the agent is acting is the importer. If there is no importer of record, the owner of the special fuel at the time of importation is the importer.

(27) "Special fuel supplier" means a person who holds a federal certificate issued under the internal revenue code and authorizes the person to tax-free transactions on special fuel in the bulk transfer-terminal system

* * * * *

(29) "Terminal" means a special fuel storage and distribution facility that has been assigned a terminal control number by the internal revenue service, is supplied by pipeline or vessel, and from which reportable special fuel is removed at a rack.

* * * * *

82.38.030 Tax imposed—Rate—Incidence —Allocation of proceeds—Expiration of subsection. (1) There is hereby levied and imposed upon special fuel licensees, other than special fuel

distributors, a tax at the rate of twenty-three cents per gallon of special fuel . . . .

* * * * *

(7) Taxes are imposed when:

(a) Special fuel is removed in this state from a terminal if the special fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is by a special fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(b) Special fuel is removed in this state from a refinery if either of the following applies:

(i) The removal is by bulk transfer and the refiner or the owner of the special fuel immediately before the removal is not a licensee; or

(ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state, or the removal is to a special fuel supplier for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320;

(c) Special fuel enters into this state for sale, consumption, use, or storage, unless the fuel enters this state for direct delivery to an international fuel tax agreement licensee under RCW 82.38.320, if either of the following applies:

(i) The entry is by bulk transfer and the importer is not a licensee; or

(ii) The entry is not by bulk transfer;

(d) Special fuel is sold or removed in this state to an unlicensed entity unless there was a prior taxable removal, entry, or sale of the special fuel;

(e) Blended special fuel is removed or sold in this state by the blender of the fuel. The number of gallons of blended special fuel subject to tax is the difference between the total number of gallons of blended special fuel removed or sold and the number of gallons of previously taxed special fuel used to produce the blended special fuel;

(f) Dyed special fuel is used on a highway, as authorized by the internal revenue code, unless the use is exempt from the special fuel tax;

(g) Dyed special fuel is held for sale, sold, used, or is intended to be used in violation of this chapter;

(h) Special fuel purchased by an international fuel tax agreement licensee under RCW 82.38.320 is used on a highway; and

(i) Special fuel is sold by a licensed special fuel supplier to a special fuel distributor, special fuel importer, or special fuel blender and the special fuel is not removed from the bulk transfer-terminal system.

82.38.031 Tax imposed—Intent. It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by RCW 82.38.030 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

* * * * *

82.38.035 Tax liability. (1) A licensed supplier shall be liable for and pay tax on special fuel to the department as provided in RCW 82.38.030(7)(a). On a two-party exchange, or buy-sell agreement between two licensed suppliers, the receiving exchange partner or buyer shall be liable for and pay the tax.

(2) A refiner shall be liable for and pay tax to the department on special fuel removed from a refinery as provided in RCW 82.38.030(7)(b).

(3) A licensed importer shall be liable for and pay tax to the department on special fuel imported into this state as provided in RCW 82.38.030(7)(c).

(4) A licensed blender shall be liable for and pay tax to the department on the removal or sale of blended special fuel as provided in RCW 82.38.030(7)(e).

(5) A licensed dyed special fuel user shall be liable for and pay tax to the department on the use of dyed special fuel as provided in RCW 82.38.030(7)(f).

(6) Nothing in this chapter prohibits the licensee liable for payment of the tax under this chapter from including as a part of the selling price an amount equal to such tax.

* * * * *

82.38.160 Computation and payment of tax—Remittance—Electronic funds transfer. (1) The tax imposed by this chapter shall be computed by multiplying the tax rate per gallon provided in this chapter by the number of gallons of special fuel subject to the special fuel tax.

* * * * *

82.38.170 Civil and statutory penalties and interest—Deficiency assessments. . . .

* * * * *

(3) If any licensee, whether or not he or she is licensed as such, fails, neglects, or refuses to file a special fuel tax report required under this chapter, the department may, on the basis of information available to it, determine the tax liability of the licensee for the period during which no report was filed, and to the tax as thus determined, the department shall add the penalty and interest provided in subsection (2) of this section. An assessment made by the department pursuant to this subsection or to subsection (2) of this section shall be presumed to be correct, and in any case where the validity of the assessment is drawn in question, the burden shall be on the person who

challenges the assessment to establish by a fair preponderance of the evidence that it is erroneous or excessive as the case may be.

* * * * *

Washington Administrative Code section 308-77-005 (2011)

Definitions. (1) "Special fuel" as defined in RCW 82.38.020(23) includes diesel fuel, propane, natural gas, kerosene, biodiesel, and any other combustible liquid or gas by whatever name the liquid or gas may be known or sold for the generation of power to propel a motor vehicle on the highways except fuel that is subject to the tax imposed by chapter 82.36 RCW.

* * * * *

No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

An 1855 treaty between the United States and the Yakama Indian Nation provides members of the tribe "the right, in common with citizens of the United States, to travel upon all public highways." In a series of cases, the Ninth Circuit has rejected claims that this language exempts the Yakama from taxes or state fees on off-reservation commercial activities, holding instead that the language is limited to securing for tribal members a right to travel on public highways without paying a fee for that use or obtaining state approval. In this case, however, the Washington Supreme Court interpreted the treaty far more broadly, holding that it implicitly prohibits states from taxing "any trade, traveling, and importation" by the Yakama, even off-reservation, "that requires the use of public roads." The court therefore held that the treaty preempts Washington from imposing wholesale fuel taxes on Respondent Cougar Den, a Yakama-owned fuel distributor that imports millions of gallons of fuel into Washington annually for sale to the general public.

The question presented is:

Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on off-reservation commercial activities that make use of public highways.

PARTIES

The Washington State Department of Licensing is the Petitioner and was the appellant in the Washington Supreme Court.

The Respondent is Cougar Den, Inc., a company incorporated under the laws of the Yakama Nation. Cougar Den, Inc., was the respondent in the Washington Supreme Court.

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INTRODUCTION

To preserve the respective sovereignty of states and Indian tribes and to minimize disputes between them, this Court has adopted a bright-line approach to determine when states can tax tribes and their members. In Indian country, Indians are generally immune from state taxes. But outside Indian country, Indians are subject to generally applicable state taxes "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973). Because of the importance of state taxing power, "tax exemptions are not granted by implication"; there must be "a definitely expressed exemption[.]" *Id.* at 156 (internal quotation marks omitted).

This case involves application of Washington State's fuel tax to Respondent Cougar Den, a fuel company owned by a member of the Yakama Nation. It is undisputed that the tax is generally applicable and applies to Cougar Den's possession of fuel outside the Yakama reservation. Cougar Den refuses to pay the tax and has avoided tens of millions of dollars in Washington fuel taxes.

Cougar Den claims to be exempt from the tax under an 1855 treaty that never mentions taxes, fuel, or off-reservation trading rights. It relies upon a clause providing the Tribe "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859). Cougar Den maintains that the State cannot tax its fuel because it ships the fuel by highway.

The Washington Supreme Court agreed with Cougar Den. Although the court acknowledged that the tax "is assessed regardless of whether Cougar Den uses the highway," it nonetheless found that the tax conflicted with the Yakama right to travel by highway. Pet. App. 13a, 13a-14a. The court held that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." Pet. App. 16a.

This Court should reverse. The Washington court ignored the clear rule that, for off-reservation activities, "tax exemptions are not granted by implication" and must be "definitely expressed[.]" *Mescalero Apache Tribe*, 411 U.S. at 156. "[T]he right, in common with citizens of the United States, to travel upon all public highways[,]" simply does not address (much less expressly preempt) taxes on goods, like Washington's fuel tax.

A contrary ruling would create a massive loophole in state tax regimes, allowing Yakama businesses to avoid taxes nationwide simply by transporting goods over highways. It also would give the Yakama Nation an unwarranted economic advantage over other tribes and non-tribal businesses. Cougar Den is already expanding its fuel business to other states, claiming exemption from their fuel taxes. Other Yakama businesses are claiming exemption from state and federal cigarette taxes on the same theory: cigarettes shipped by highway cannot be taxed. Nothing in the Yakama Treaty justifies creation of this expansive new right to avoid taxes on goods simply by transporting them by highway.

OPINIONS BELOW

The Washington Supreme Court opinion is reported at 188 Wash. 2d 55, 392 P.3d 1014 (2017). Pet. App. 1a-29a. The superior court order is unreported. Pet. App. 30a-43a. The final order of the Director of the Washington Department of Licensing is unreported. Pet. App. 44a-61a.

JURISDICTION

The Washington Supreme Court issued its opinion on March 16, 2017. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES

The full text of the relevant Washington fuel tax statutes is in the Joint Appendix at pages 116a to 131a. The most relevant excerpts are provided here.

Wash. Rev. Code § 82.36.020 (2012) (JA 119a)

(1) There is hereby levied and imposed upon motor vehicle fuel licensees . . . a tax at the rate computed in the manner provided in RCW 82.36.025 on each gallon of motor vehicle fuel.

(2) The tax imposed by subsection (1) of this section is imposed when any of the following occurs:

> (a) Motor vehicle fuel is removed in this state from a terminal if the motor vehicle fuel is removed at the rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;
>
> (b) Motor vehicle fuel is removed in this state from a refinery if either of the following applies:

> (i) The removal is by bulk transfer and the refiner or the owner of the motor vehicle fuel immediately before the removal is not a licensee; or
>
> (ii) The removal is at the refinery rack unless the removal is to a licensed exporter for direct delivery to a destination outside of the state;
>
> (c) Motor vehicle fuel enters into this state if either of the following applies:
>
> (i) The entry is by bulk transfer and the importer is not a licensee; or
>
> (ii) The entry is not by bulk transfer;
>
> . . . .

Wash. Rev. Code § 82.36.022 (2012) (JA 120a)

> It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. . . .

Wash. Rev. Code § 82.36.100 (2012) (JA 122-23a)

> Every person other than a licensee who acquires any motor vehicle fuel within this state upon which payment of tax is required under the provisions of this chapter, or imports such motor vehicle fuel into this state and sells, distributes, or in any manner uses it in this state shall, if the tax has not been paid, apply for a license to carry on such activities, comply with all the provisions of this chapter, and pay an excise tax at the rate computed in the manner provided in RCW 82.36.025 for each gallon thereof so sold,

distributed, or used during the fiscal year for which such rate is applicable. . . .

Article I of the Treaty with the Yakamas provides (JA 76a-77a):

> The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows [description omitted].

Article III of the Treaty with the Yakamas provides (JA 80-81a):

> That, if necessary for the public convenience, roads may be run through the said reservation ; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them ; as also the right, in common with citizens of the United States, to travel upon all public highways.
>
> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them ; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

STATEMENT

A. Washington's Fuel Tax

Washington's fuel tax is one of the State's most important and longstanding revenue sources. The State has taxed fuel since 1921, and the tax generates over $1.5 billion annually.[1]

Over the years, Washington has changed the tax several times to minimize tax evasion and respond to changing circumstances. Most recently, the State significantly changed its approach to collecting fuel taxes in response to *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). There, the court held that the incidence of the tax at the time fell on retailers (gas stations), including those operating within Indian reservations. *Id.* at 1262. Because states generally cannot impose taxes on tribes or their members within their reservations, the district court held that the State was barred from collecting its fuel tax from tribally-owned gas stations within Indian country. *Id.* The district court based its ruling on this Court's decision in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), which reached the same conclusion as to a similar fuel tax.

In *Chickasaw Nation*, however, this Court made clear that "if a State is unable to enforce a tax because the legal incidence . . . is on Indians or Indian tribes, the State generally is free to amend its law to

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[1] 1921 Wash. Sess. Laws p. 669 (ch. 173); Wash. State Dep't of Transp., *History of State Transportation Revenue + Forecasts by Fiscal Year* (Excel spreadsheet), https://www.wsdot.wa.gov/sites/default/files/2018/03/15/Economic-Data-TransportationRevenueHistory.xlsx (reporting for 2016).

shift the tax's legal incidence." *Chickasaw Nation*, 515 U.S. at 460. After the district court ruled in *Squaxin Island Tribe*, the Washington Legislature did exactly that. Rather than requiring payment of the tax after a retail sale on the reservation, Washington changed the incidence of the tax to a licensee's first possession of motor vehicle fuel in the State. Wash. Rev. Code §§ 82.36.020, .026; Wash. Rev. Code §§ 82.38.030, .035.[2] The licensees liable for the tax include fuel suppliers and importers. JA 121a, Wash. Rev. Code § 82.36.026; JA 129a, Wash. Rev. Code § 82.38.035. In keeping with this new structure, the State's express statutory intent was changed from a tax on end consumers to a tax "on the first taxable event and upon the first taxable person" within the State. Compare former Wash. Rev. Code § 82.36.407(1) (1999) to JA 120a, Wash. Rev. Code § 82.36.022 (2012) and JA 129a, Wash. Rev. Code § 82.38.031 (2012).

Washington's tax is now assessed on the first possession of each gallon of fuel withdrawn from a refinery or terminal in the State or brought into the State (unless the fuel is in the tank of a car). JA 119a-20a, Wash. Rev. Code §§ 82.36.020, .022; JA 126-28, Wash. Rev. Code § 82.38.030. For example,

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[2] Unless otherwise indicated, citations to Washington fuel tax statutes refer to the 2012 versions in effect when the events of this case occurred. Chapters 82.36 and 82.38 of the Washington Revised Code were consolidated without substantive change into a single Chapter 82.38 as of July 2016. 2013 Wash. Sess. Laws p. 1322 (ch. 225); 2015 Wash. Sess. Laws p. 1178 (ch. 228, § 40).

when a tanker truck or rail car is loaded at a refinery in Washington, the tax attaches when the fuel is loaded.[3] JA 119a, Wash. Rev. Code § 82.36.020(2)(a)-(b); JA 127a, Wash. Rev. Code § 82.38.030(7)(a)-(b). Similarly, if fuel is withdrawn at an out-of-state refinery and brought into Washington, the tax is imposed on the first possession in the State. JA 119a, Wash. Rev. Code § 82.36.020(2)(c); JA 120a, Wash. Rev. Code § 82.36.022; JA 121a, Wash. Rev. Code § 82.36.026(3); JA 127a, Wash. Rev. Code § 82.38.030(7)(c); JA 129a, Wash. Rev. Code § 82.38.035(3).

A taxable first possession of motor vehicle fuel never occurs within the Yakama Reservation. There are no refineries or terminals located within the Reservation. JA 40a. The Reservation is situated entirely within Washington State and does not touch the state border. JA 101a.

Virtually every tribe in Washington that has gas stations within its reservation has entered a fuel-tax agreement with the State.[4] Under the agreements, tribally-owned gas stations purchase fuel exclusively from taxpaying, state-licensed fuel companies. Wash. Rev. Code § 82.38.310(3)(a) (2018). The State then

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[3] First possession is not taxed if the fuel is obtained by a licensed exporter for delivery outside Washington. Wash. Rev. Code § 82.36.020(2)(b)(ii); Wash. Rev. Code § 82.38.030(7)(b)(ii).

[4] Wash. State Dep't of Licensing, *Tribal Fuel Tax Agreement Report* 2 (Jan. 2018), https://www.dol.wa.gov/about/docs/leg-reports/2017-tribal-fuel-tax-agreement.pdf (reporting for 2016).

refunds to the tribes an amount—typically equal to 75% of the state fuel tax revenue—from the fuel purchased and resold by tribal retailers.[5] Tribes are then able to use this revenue for their transportation and public safety needs. Wash. Rev. Code § 82.38.310(3)(b) (2018). The Yakama Nation is the only tribe in Washington that has gas stations within its reservation but has chosen to terminate its fuel agreement with the State. JA 28a, 102a-03a, 105a-10a.

B. Cougar Den Is Owned by a Yakama Indian and Brought Millions of Gallons of Fuel into Washington Without Paying the State Fuel Tax

Cougar Den is owned by Kip Ramsey, a member of the federally-recognized Yakama Nation. Pet. App. 2a, 62a-63a (Stip. Facts 2, 5-7). The Tribe signed a treaty with the United States in 1855 that created the Yakama Reservation in Washington while ceding the Tribe's claim to any "right, title, and interest" in other lands. Treaty with the Yakamas, arts. I & II, 12 Stat. at 951-52. The reservation includes hundreds of thousands of acres owned in fee by individual Indian and non-Indian landowners, with the remainder held in trust by the United States. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). Much of the fee land is in three cities within the reservation. *Id.* "The remaining fee land is scattered throughout the reservation in a 'checkerboard' pattern." *Id.* State highways and county roads funded by state fuel taxes

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[5] *Id.* at 1-2.

serve these cities and the reservation. *See Brendale*, 492 U.S. at 445 (Stevens, J., concurring); Wash. Rev. Code § 46.68.090.[6]

At the time of the events in this case, Cougar Den had never applied for or held a Washington license to supply fuel. Pet. App. 49a, 63a. In 2012, it obtained an Oregon fuel dealer license and began using it to purchase vast quantities of fuel in Portland, Oregon. Pet. App. 63a, 64a. Cougar Den avoided paying Oregon fuel taxes by representing that its fuel would be exported into Washington under a tribal license. *See* Or. Rev. Stat. § 319.240. Cougar Den stipulated that it imported millions of gallons of fuel in a matter of months without paying Washington taxes. Pet. App. 64a (Stip. Facts 12-14). Cougar Den sold nearly all of this fuel to Yakama-owned gas stations within the Yakama Reservation. Pet. App. 50a. Those stations then sold the fuel to the general public. Pet. App. 50a.

C. When Washington's Department of Licensing Sought to Collect Cougar Den's Unpaid Taxes, Cougar Den Claimed to be Exempt Under the Yakama Treaty

Washington law directs the Department of Licensing to administer motor vehicle fuel taxes. Wash. Rev. Code § 46.01.040(1). After learning that Cougar Den had brought over 5 million gallons of fuel into Washington without being licensed or paying taxes, the Department assessed Cougar Den $3.6

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[6] *See also* Wash. State Dep't of Transp., *Washington State Highway Map*, http://www.wsdot.wa.gov/Publications/HighwayMap/view.htm (last visited Aug. 6, 2018).

million in taxes, penalties, and interest for Cougar Den's activities between March and October 2013. Pet. App. 49a; JA 10a-14a. Cougar Den continued to bring fuel into Washington without paying taxes and without a license. The Department continued to assess taxes, and tens of millions of dollars in later assessments are stayed pending the outcome of this case. *See* JA 19a-26a (Assessments 760M, 761M). Cougar Den also began shipping untaxed fuel from Oregon to several Indian reservations in California. *See* Pet. App. 27a.

In response to the Department's assessment, Cougar Den asked for a formal administrative hearing. JA 15a-18a. At the hearing, Cougar Den's arguments were limited to questions of law. JA 7a-8a, 15a-18a. Cougar Den's primary argument was that it was owned by a member of the Yakama Nation and that the Yakama Treaty prohibited state motor vehicle fuel taxes from being levied on its fuel. BIO App. 6; Pet. App. 54a (Conclusion 10). Article III of that Treaty specifies that the United States can build roads through the reservation and that the Yakama people have "the right, in common with citizens of the United States, to travel upon all public highways."[7]

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[7] Nearly identical language concerning travel upon public highways appears in two other treaties negotiated around the same time with tribes in Idaho and Montana. *See* Treaty with the Nez Percés, art. III, ¶ 1, 12 Stat. 957, 958 (June 11, 1855, ratified Mar. 8, 1859, proclaimed Apr. 29, 1859); Treaty with the Flatheads, art. III, ¶ 1, 12 Stat. 975, 976 (July 16, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859).

In response to cross motions for summary judgment, an administrative law judge initially ruled in favor of Cougar Den. BIO App. 1-15. Under state law, an agency director reviews initial orders by administrative law judges, so the matter then went to the Director of Licensing. BIO App. 15. The Director reviewed the record and entered a final order rejecting Cougar Den's treaty defense. Pet. App. 44a, 56a-58a.

The Director relied on three legal conclusions. First, the "Structure of Washington Fuel Tax Laws" showed that the tax was imposed outside the reservation. Pet. App. 51a-53a. Cougar Den did not dispute this conclusion. Second, "[o]utside of Indian reservations, Indians are subject to state taxes and regulations absent express federal law to the contrary." Pet. App. 54a (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Third, the order held that no treaty language expresses a right to sell fuel free from state taxes or without the required license. Pet. App. 56a-58a. The taxes do not violate a treaty right because they "are not a charge for Cougar Den's use of public highways," but relate to the fuel itself. Pet. App. 58a.

Cougar Den sought judicial review under the State Administrative Procedure Act, Wash. Rev. Code § 34.05.570(3). A state superior court reversed the Final Order, concluding that the Director erred in interpreting the treaty. Pet. App. 34a-35a.[8] The trial judge concluded that the treaty right to travel "shields

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[8] Under state law, Washington courts review only the final agency order, not initial orders. *Tapper v. Emp't Sec. Dep't*, 122 Wash. 2d 397, 404, 858 P.2d 494 (1993) (citing Wash. Rev. Code § 34.05.464(4)).

the transport of fuel" moved on public highways from taxation. Pet. App. 39a. The State appealed directly to the Washington Supreme Court. Pet. App. 3a.

D. The Washington Supreme Court Held That the Yakama Treaty Preempts Taxing Goods Transported over Public Highways

The Washington Supreme Court affirmed in a divided decision. Because the only issue in the case was a legal question of treaty interpretation, the court applied de novo review. Pet. App. 3a-4a.

The court began by noting that the incidence of this tax is outside the Yakama Reservation, and that "[o]utside an Indian reservation, Indian citizens are subject to state tax laws, '[a]bsent express federal law to the contrary.'" Pet. App. 4a (quoting *Mescalero Apache Tribe*, 411 U.S. at 148 (second alteration in original)). The majority then noted that "[a] treaty constitutes an express federal law[,]" Pet. App. 4a, but never cited or discussed the *Mescalero* test again. Instead, the majority moved quickly past the treaty language and focused on how it thought the Yakama understood the treaty when it was signed. Pet. App. 6a-9a, 16a.

In analyzing the Treaty's history, the majority relied primarily on *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). Pet. App. 6a. *Cree* involved "Washington truck license and overweight permit fees," i.e., fees paid for using highways. *Cree*, 157 F.3d at 764. The Ninth Circuit deemed such fees preempted based on the Yakamas' understanding that they would have "the right to transport goods to market over public highways without payment of fees *for that use*." *Id.* at 769 (emphasis added). The Washington court majority

recognized that Cougar Den's case is different because here "the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a. But it held that this was "immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. The majority concluded that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." Pet. App. 16a.

To support this expansion of *Cree*'s holding beyond fees for using the highway, the majority cited *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). Pet. App. 13a. *Smiskin* held that Yakama members could not be prosecuted for failing to give the State notice before transporting cigarettes. The majority deemed *Smiskin* controlling, saying: "In both cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market without restriction." Pet. App. 13a.

The majority sought to distinguish *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 1542 (2015), which involved a Yakama-owned cigarette company that shipped its cigarettes nationwide. The company argued that the Treaty exempted it from fees the State imposes on cigarette manufacturers. The Ninth Circuit disagreed, saying: "[T]he Treaty is not an express federal law that exempts King Mountain from state economic regulations." *Id.* at 994. The Washington court dismissed *King Mountain*, asserting that "travel was not at issue" there. Pet. App. 13a.

Chief Justice Fairhurst and Justice Wiggins dissented, finding that the majority's reasoning contradicted precedent and would create a giant hole "in Washington's ability to tax goods consumed within the state, without legal basis." Pet. App. 17a.

The dissent pointed out that the majority decision conflicted with Ninth Circuit precedent. "*Smiskin* does not stand for the proposition the majority asserts—the Yakama Nation's treaty right to travel is a de facto right to trade simply because travel is necessary for trade. Indeed, a reading of *King Mountain* confirms the opposite to be true." Pet. App. 24a. "Travel was necessary for the trade at issue in *King Mountain*, yet the Ninth Circuit found the state obligation burdened only trade, rather than travel and, therefore, was not preempted . . . ." Pet. App. 24a (citing *King Mountain*, 768 F.3d at 997-98).

The dissent also noted that King Mountain had made the same argument as Cougar Den, claiming that the right to travel "'unequivocally prohibit[s] imposition of economic restrictions . . . on the Yakama people's Treaty right to . . . trade.'" Pet. App. 25a (alterations in original) (quoting *King Mountain*, 768 F.3d at 997). But the Ninth Circuit held that the right to travel did *not* carry with it a right to avoid regulation or taxation of trade; it only "'guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees for that use.'" Pet. App. 25a (quoting *Cree*, 157 F.3d at 769).

The dissent concluded that the majority "puts at risk . . . Washington's, and potentially other states', ability to tax goods[.]" Pet. App. 27a. "Nothing indicates any of the parties understood the Treaty of 1855 to provide for such a right." Pet. App. 28a.

SUMMARY OF ARGUMENT

This Court has adopted a bright-line approach to determine when states can tax Indians. Absent congressional authorization, states cannot tax Indians within Indian country. But outside of Indian country, generally applicable state and federal taxes apply to Indians "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe*, 411 U.S. at 148. Exemptions from such taxes must be "clearly expressed" and "'unambiguously proved.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (quoting *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988)). This Court has rigorously enforced these principles because they serve important goals, including reducing state-tribal disputes and ensuring efficient tax administration.

It is undisputed in this case that Washington's fuel tax is nondiscriminatory and applies to Cougar Den outside the Yakama Reservation. Cougar Den therefore must show that federal law "clearly expresse[s]" and "'unambiguously prove[s]'" an intent to exempt it from this tax. *Chickasaw Nation*, 534 U.S. at 95. Cougar Den can make no such showing.

Cougar Den claims exemption based on the Yakama Treaty clause providing the tribe "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. But nothing in this language

expresses an intent to preempt application of taxes like Washington's fuel tax. This is a tax on the possession of goods—fuel—and "is assessed regardless of whether Cougar Den uses the highway[.]" Pet. App. 13a-14a. Nothing in the right-to-travel clause preempts application of a tax such as this.

In reaching a contrary conclusion, the Washington Supreme Court relied primarily on a lopsided and incomplete description of how the parties allegedly understood the treaty when it was signed. But alleged understandings cannot create unwritten tax exemptions, and even if they could in some generic sense, they cannot do so here. Nothing in the treaty's text or negotiating history suggests that the parties understood they were creating a permanent right for the Yakama to be free of taxes on goods simply because they transport those goods by highway.

The consequences of accepting Cougar Den's expansive view of the treaty would be significant and unfortunate. Cougar Den could continue expanding its fuel business to sell tax-free fuel throughout Washington and in Indian Country in other states. Other Yakama businesses could continue and expand their efforts to evade taxes on other goods, particularly cigarettes, on the same theory that the Washington court applied here. States and the federal government would thus be deprived of crucial tax revenue and power to regulate certain goods. And other tribes and non-tribal businesses would be placed at a severe, unwarranted disadvantage by the

Yakama's expansive exemption from taxation of goods transported by highway. This Court should reverse and hold that Washington's fuel tax applies to Cougar Den.

ARGUMENT

A. This Court's Precedent Requires Express Federal Law to Preempt Application of Nondiscriminatory, Off-Reservation Taxes Like the Tax Here

It is undisputed that the fuel tax at issue here is neutral as between Indians and non-Indians and that its incidence is off-reservation. Pet. App. 4a-5a, 54a-55a. Under this Court's precedent, such taxes are preempted only if they conflict with express federal law.

This Court has adopted a bright-line approach to determine when states can tax tribes or their members, with the test turning on where the incidence of the tax falls. When a state imposes a non-discriminatory tax *outside* Indian country, as here, the tax applies to a tribe and its members "[a]bsent express federal law to the contrary[.]" *Mescalero Apache Tribe*, 411 U.S. at 148. But if a State seeks to tax a tribe or its members *within* Indian Country, the opposite is true: the tax is invalid "[a]bsent explicit congressional direction to the contrary[.]" *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128 (1993); *Chickasaw Nation*, 515 U.S. at 459 ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.").

This bright-line standard about where the tax applies serves several crucial purposes emphasized by this Court. It avoids needless disputes and litigation between states and tribes. *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) ("'The need to avoid litigation . . . counsels in favor of a bright-line standard . . . .'" (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999))). It ensures efficiency and predictability in tax administration. *See, e.g.*, *Wagnon*, 546 U.S. at 113; *Chickasaw Nation*, 515 U.S. at 459-60 ("[T]ax administration requires predictability."). It "accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Chickasaw Nation*, 515 U.S. at 459. And it appropriately acknowledges the respective sovereignty of states and tribes. *See, e.g.*, *Wagnon*, 546 U.S. at 112-13 (explaining that this rule "relies 'heavily on the doctrine of tribal sovereignty . . . which historically gave state law "no role to play" within a tribe's territorial boundaries'" (quoting *Sac & Fox Nation*, 508 U.S. at 123-24), and describing "the special geographic sovereignty concerns" that justify a bright-line rule).

To protect these important principles, this Court has repeatedly refused to modify the test at the request of either states or tribes. For example, when Oklahoma argued that the Court should look beyond the legal incidence of an on-reservation tax to its economic impact, this Court refused, emphasizing that "our focus on a tax's legal incidence

accommodates the reality that tax administration requires predictability." *Chickasaw Nation*, 515 U.S. at 459-60. Similarly, when a tribe argued that an off-reservation fuel tax like the one at issue here was preempted because it interfered with tribal taxing authority, this Court refused to modify its normal bright-line test. *See, e.g.*, *Wagnon*, 546 U.S. at 114-15 (refusing to apply a different test despite Tribe's "claim that the Kansas motor fuel tax interferes with its own motor fuel tax").

Because the Court has adopted such a bright-line rule based on the incidence of the tax, where the incidence falls is "[t]he initial and frequently dispositive question in Indian tax cases[.]" *Chickasaw Nation*, 515 U.S. at 458. Here, the answer to this "frequently dispositive question" is undisputed: the incidence is off-reservation.

As to such a tax, this Court has forcefully described the principles to be applied. Tribes and their members are subject to nondiscriminatory off-reservation taxes "[a]bsent a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau v. Burnet*, 283 U.S. 691, 697 (1931)). "[T]ax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). Instead, they must be "clearly expressed" and "'unambiguously proved.'" *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). If Congress wants to preempt state

taxes, it must "say so in plain words"; "[s]uch a conclusion cannot rest on dubious inferences." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n*, 319 U.S. at 607); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1870) (holding that if an exemption had been intended, it "would doubtless have been expressed"). These are the principles that apply here.

B. Nothing in the Yakama Treaty Expressly Preempts Application of the Tax Here

Respondent Cougar Den claims exemption from Washington's fuel tax based on the Yakama Treaty clause guaranteeing members "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, 12 Stat. at 953 . Nothing in this language, however, expressly exempts the Yakama from Washington's fuel tax.

In analyzing Cougar Den's claim, this Court starts with the treaty's plain language, liberally construing ambiguous terms in favor of the Tribe. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999) ("[T]he starting point for any analysis . . . is the treaty language itself."); *Chickasaw Nation*, 515 U.S. at 465. The Court does not rewrite or expand the treaty language or ignore clear limits on its scope. *See, e.g., id.* at 466 ("[L]iberal construction cannot [overcome] a clear geographic limit in the Treaty."); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (holding that treaties "cannot be re-written or expanded beyond their clear terms").

Applying these principles, nothing in the Yakama Treaty, even liberally construed, provides a

"'definitely expressed' exemption" from Washington's fuel tax. *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696). Washington's fuel tax does not restrict the Yakama's (or anyone's) right to travel on public highways. The tax is assessed per gallon of fuel and does not depend in any way on use of a highway. As the Washington Supreme Court acknowledged, the tax "is assessed regardless of whether Cougar Den uses the highway." Pet. App. 13a-14a. It is thus untenable to say that the Yakama right to travel on public highways "clearly expresse[s]" and "'unambiguously prove[s]'" preemption of Washington's fuel tax. *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). The right-to-travel clause simply does not address (much less expressly preempt) taxes on goods that happen to be transported over public highways.

This Court's decisions in *Mescalero Apache Tribe* and *Chickasaw Nation* are instructive. Both confirm that the right-to-travel provision comes nowhere close to constituting a definitely expressed exemption from Washington's fuel tax.

Mescalero Apache Tribe addressed the Indian Reorganization Act of 1934, which provided that "'any lands or rights acquired' pursuant to" the Act "'shall be exempt from State and local taxation.'" *Mescalero Apache Tribe*, 411 U.S. at 155 (quoting 25 U.S.C. § 465, subsequently renumbered as 25 U.S.C. § 5108). On that basis, this Court held preempted a state use tax on "permanent improvements" affixed to off-reservation land the tribe leased from the United States. *Id.* at 158. But the Court rejected the

argument that the tax exemption extended to income the Tribe earned from the tax-exempt land. The Court emphasized that, "[o]n its face, the statute exempts land and rights in land, not income derived from its use." *Mescalero Apache Tribe*, 411 U.S. at 155. It then held that in the absence of clear statutory language, courts "will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156.

Here, "[o]n its face," *id.* at 155, the Treaty secures "the right, in common with citizens of the United States, to travel upon all public highways," Treaty with the Yakamas, art. III, 12 Stat. at 953. This language says nothing about a tax exemption at all, much less an exemption from a tax on fuel or other goods, even if they happen to be transported by highway. If a specific tax exemption for land does not exempt income earned from that land, then surely a provision that says nothing about taxes and never mentions fuel or any other good does not preempt a tax on fuel.

In *Chickasaw Nation*, the Tribe argued that its members who worked for the tribal government on the reservation but lived outside the reservation were exempt from Oklahoma's income tax, a non-discriminatory off-reservation tax like the one here. The Tribe cited a treaty provision stating that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation[.]" *Chickasaw Nation*, 515 U.S. at 465 (first alteration in original) (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333-34). The Tribe contended that "the State's income tax, when imposed

on tribal members employed by the Tribe, is a law 'for the government of the [Chickasaw] Nation[.]'" *Chickasaw Nation*, 515 U.S. at 465 (first alteration in original).

This Court rejected the Tribe's argument, saying that the Treaty's terms limited its reach to "'within [the Nation's] limits.'" *Id.* at 466 (alteration in original). The Court therefore declined to "read the Treaty as conferring supersovereign authority to interfere with another jurisdiction's sovereign right to tax income[.]" *Id.*

Similarly, the Yakama Treaty language is limited to guaranteeing "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. This language says nothing whatsoever about preempting taxes, much less preempting an off-reservation tax imposed on possession of goods where the tax does not restrict or condition the taxpayer's use of the highway.

In nonetheless concluding that the right-to-travel clause preempted application of Washington's fuel tax, the Washington Supreme Court cited four rationales. None is persuasive.

1. Cougar Den's decision to transport fuel by highway does not convert Washington's fuel tax into a restriction on highway travel

Although the Washington court acknowledged that Washington's fuel tax "is assessed regardless of whether Cougar Den uses the highway," Pet. App. 13a-14a, it nonetheless held that the Yakama right to

travel on public highways preempted the tax. The court's primary rationale was that "in this case, it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. That conclusion was both factually unsupported and legally irrelevant.

Neither the administrative agency that initially adjudicated this dispute nor the superior court judge who reviewed the agency's decision made any finding that "it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. There are many ways to import fuel into Washington, from railroad to barge to pipeline, and an importer can use any of them.

More importantly, even if the highway were the only way for Cougar Den to import fuel, that would not warrant rewriting the Treaty to expressly exempt the company from this uniform, off-reservation tax. The Treaty guarantees "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakamas, art. III, 12 Stat. at 953. Nothing in this language says anything about preempting off-reservation taxes on possession of goods simply because the only practical way to transport them is by highway.

This "practicability" argument is not only untethered from the treaty text, it also leads to wildly implausible results that the parties could not possibly have intended. For example, it would mean that whether goods are exempt from taxes would depend on factors like whether the goods are too heavy to transport by airplane. Absolutely nothing in the treaty language or the parties' intentions would support that result. More broadly, this rationale

would mean that the right to travel by highway created an exemption from future taxes based on the happenstance of what means of transportation for a good were then practicable. Under this reasoning, construction of an airstrip or rail line within the Yakama Reservation (both of which already exist) would suddenly render certain goods subject to taxation because it would become practical to transport them by means other than highway. That makes no sense.

This reasoning also (as detailed further below) would lead to the absurd conclusion that the parties intended to grant the Yakama carte blanche to transport and sell goods nationwide free of taxes on those goods so long as the only practical way to transport them was by highway. The treaty language contains no inkling that it created such an expansive right, the shape of which would change constantly as the means of transportation evolve.

2. That the taxable event here occurred when Cougar Den brought fuel into Washington does not convert Washington's fuel tax into a restriction on highway travel

The Washington Supreme Court also opined that Washington's fuel tax is a tax on highway travel because the State "taxes the importation of fuel." Pet. App. 16a. This rationale for claiming the tax is for traveling on public highways cannot withstand scrutiny.

Washington's fuel tax applies to fuel purchased both inside and outside of Washington, not just to imported fuel. The tax applies to a licensee's

first possession in the State, regardless of where the fuel is obtained. When a licensee acquires fuel from a terminal in Washington, the tax immediately applies to the possession of the fuel. JA 119a, Wash. Rev. Code § 82.36.020(2); JA 121a, Wash. Rev. Code § 82.36.026(1); JA 127a-28a, Wash. Rev. Code § 82.38.030(7); JA 129a, Wash. Rev. Code § 82.38.035(1). And when a licensee purchases fuel at a facility outside Washington, the tax applies the moment the fuel crosses into Washington, because that is the first possession in the State. Pet. App. 53a; JA 119a, Wash. Rev. Code § 82.36.020(2)(c); JA 120a, Wash. Rev. Code § 82.36.022; JA 121a, Wash. Rev. Code § 82.36.026(3); JA 127a-29a, Wash. Rev. Code § 82.38.030(7)(c); JA 129a, Wash. Rev. Code § 82.38.035(3).

The fact that bringing fuel into Washington is one possible trigger for the tax does not convert the tax into a fee or tax on highway travel. For one thing, the tax applies even if the licensee imports the fuel without using the highway, such as by railcar. *See* JA 119a-20a, Wash. Rev. Code § 82.36.020; JA 126a-28a, Wash. Rev. Code § 82.38.030. More importantly, just because importing fuel by highway is one possible trigger for the tax does not turn this into a tax on highway travel; the nature of a tax is not determined by one possible application. *Cf. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole'" (alteration in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))). The tax applies to the fuel itself, is imposed per gallon of fuel

possessed, and "is assessed regardless of whether Cougar Den uses the highway[.]" Pet. App. 13a-14a. Calling this tax an import tax does not make it a tax on highway travel.

Here again, the absurd consequences of the Washington court's reading demonstrate that it cannot be correct. If any tax or fee on goods the Yakama transport by highway is preempted if it can be characterized as an "import tax," then the Yakama could create a thriving business by avoiding tariffs on goods from other countries simply by trucking the goods in from Canada or Mexico. Nothing in the treaty language justifies that result.

3. Nothing in the Ninth Circuit's decisions interpreting the Treaty converts Washington's fuel tax into a restriction on highway travel

The Washington Supreme Court also justified its holding based in part on Ninth Circuit decisions interpreting the Yakama Treaty right to travel. This Court is of course not bound by those decisions. But even accepting those decisions as persuasive, they support application of Washington's fuel tax here.

The Ninth Circuit has interpreted the right-to-travel clause several times. It has rejected arguments that it preempts taxes or regulations directed at goods themselves, like the fuel tax here. Instead, it has held that the clause preempts only state taxes and fees imposed *for using highways* and requirements that the Yakama obtain state approval prior to traveling.[9]

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[9] The Ninth Circuit's view that the treaty preempts non-discriminatory state charges directly for using highways is

The Ninth Circuit first interpreted this treaty language in *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996). It rejected the district court's ruling that the meaning of the right-to-travel clause had already been determined in cases interpreting other sections of the treaty, *id.* at 1403-05, and remanded for the district court "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Id.* at 1405.

The district court conducted that inquiry and the case returned to the Ninth Circuit in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). There the court held that the treaty right to travel on highways preempted "various Washington truck license and overweight permit fees," i.e., "fees imposed for use of the public highways," when Yakamas used highways to transport logs from reservation forest lands to off-

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extremely questionable. The Yakama Treaty right "to travel upon all public highways" is "in common with citizens of the United States." And as the United States has previously argued, "a right in common with other citizens to travel on highways does not expressly exempt the Yakama from 'generally applicable' taxes." Brief For The United States In Opposition at 8, *Ramsey v. United States*, No. 02-1547 (U.S. June 26, 2003), https://www.justice.gov/osg/brief/ramsey-v-united-states-opposition. The Ninth Circuit agreed with the United States as to federal taxes and fees in *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), holding that the right-to-travel clause "contains no exemptive language. 'In common with' does not express an intent to exempt the Yakama from taxes." *Id.* at 1080. But the Court need not resolve here whether the treaty preempts charges directly for using the highway, because Washington's fuel tax is *not* a charge or condition for using the highway.

reservation mills. *Cree*, 157 F.3d at 764, 768. The court held that the treaty "guarantee[d] the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Id.* at 769 (emphasis added).

The Ninth Circuit quickly made clear that this treaty right was limited and did not extend even to federal highway taxes. In *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002), *cert. denied*, 540 U.S. 812 (2003), the court held that a different approach to treaty interpretation applies depending on whether a state or federal tax is at issue. *Id.* at 1078. As to both state and federal taxes, "tax laws applied to Indians outside of Indian country . . . are presumed valid absent express federal law to the contrary." *Id.* at 1077 (internal quotation marks omitted). But with a federal tax, the court said, there must be "express exemptive language" in the treaty before the court even considers canons of construction to determine whether "the exemption applies to the tax at issue." *Id.* at 1079. By contrast, the court said, when a court evaluates a state tax, "there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians." *Id.* at 1079. Applying the first of these two standards, the court held that the treaty "contains no 'express exemptive language'" and thus creates no treaty right to avoid federal taxes on fuel used by trucks on the highway. *Id.* at 1080.[10]

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[10] The State is unaware of any other Circuit applying this rule that courts should take a different approach to interpreting treaties depending on whether a state or federal tax is at issue. But the Court need not address this issue here because, as

The Ninth Circuit also limited its reasoning in the only other case in which it has found preemption of state law under the right-to-travel clause. In *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the court held that the Treaty guaranteed the Yakamas the right to travel on public highways without obtaining prior approval from the State. *Id.* at 1267. The court therefore held that the Treaty barred prosecution of two Yakama members for transporting untaxed cigarettes without first notifying the State. *Id.* But the court never suggested that the State cigarette tax itself was preempted as to the Yakama, only that the requirement to provide notice before using the highways was. *Id.* at 1271; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding application of this tax to the Yakama); *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008) (holding that the treaty did not preempt prosecution of a Yakama tribal member for conspiring to violate federal law by agreeing to transport untaxed cigarettes in violation of state law, because the untaxed cigarettes were contraband); *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010) (holding that *res judicata* barred Tribe from claiming that the right to travel preempts state cigarette taxes because "*Colville* squarely holds that the Yakama Treaty of 1855 does not preempt"

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explained above and below, Washington's fuel tax is not a tax for using the highway, but rather a tax on goods. Thus, even under the Ninth Circuit's approach, Washington's off-reservation tax is lawful regardless of whether it is imposed by the State or the federal government.

those laws), *aff'd on other grounds*, 658 F.3d 1078 (9th Cir. 2011).

Finally, in *King Mountain*, the court considered whether the treaty preempted a state escrow fee that tobacco manufacturers had to pay on each unit of cigarettes they sold. *King Mountain*, 768 F.3d at 991. King Mountain was a Yakama-owned tobacco manufacturer that engaged in extensive interstate trade as part of its manufacturing process, *id.* at 991, and it argued that Article III of the Treaty exempted it from the escrow fee. The court disagreed. The court first emphasized that regardless of whether a state or federal tax is at issue, an off-reservation tax is preempted only if "an express federal law" exempts the tribal business. *Id.* at 994. Because a state tax was at issue, the court considered canons of construction in assessing whether the right-to-travel clause expressly exempted King Mountain. *Id.* at 995. But it found that "the relevant text of the Yakama Treaty is not ambiguous and the plain language of the Treaty does not provide a federal exemption from the Washington escrow statute." *Id.* at 995. While "the plain text of Article III . . . reserved to the Yakama the right 'to travel upon all public highways[,]'" nothing in the treaty's text created a "right to trade" free of state taxes or regulations. *Id.* at 997.

The Washington Supreme Court attempted to distinguish *King Mountain* while treating *Smiskin* as nearly dispositive. Pet. App. 13a ("Smiskin is nearly identical to this case."). Neither conclusion is tenable.

Smiskin did not invalidate a tax on goods; it invalidated what it called a direct condition on travel on public highways—a requirement that Yakama

members notify the State before traveling with untaxed cigarettes. Indeed, *Smiskin* never hinted that the underlying cigarette tax was invalid as to the Yakama. Thus, even if *Smiskin* is rightly decided (a point the State does not concede and that this Court need not address), it provides no support for reading the right to travel provision as creating an exemption from taxes on goods. [11]

Meanwhile, the Washington court brushed aside the Ninth Circuit's decision in *King Mountain* on the ground that, "in *King Mountain*, travel was not at issue." Pet. App. 13a. The Ninth Circuit opinion in *King Mountain* refutes that statement. "King Mountain ships its tobacco crop to Tennessee where it is threshed. Then the tobacco is sent to a factory in

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[11] The State agrees with the United States that *Smiskin* was wrongly decided. *See* Brief for the United States as Amicus Curiae at 17. The purpose of Washington's pre-notification requirement was to enforce the collection of the State's tax on cigarettes. It is clear that such taxes may be applied to on-reservation sales of cigarettes to non-Indians, even by a tribe or its members, where the incidence of the tax is on the non-Indian purchaser. *See, e.g., Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 154-157; *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-83 (1976). The pre-notification requirement under Washington law creates no conflict with the Yakamas' ability to use public highways; it is at most a modest regulatory requirement that serves the comprehensive cigarette tax regime. Under *Colville* and *Moe*, both of which involved tribes whose treaties contain the "right to travel" language, such modest requirements are valid because the Tribe and its members were not exempt from enforcement of the State's overall cigarette tax regime. Thus, there was no sound reason for the Ninth Circuit in *Smiskin* to conclude that the pre-notification requirement violated the Treaty.

North Carolina where more tobacco is purchased and blended with reservation tobacco." *King Mountain*, 768 F.3d at 994. King Mountain then has its tobacco "sent back to the reservation, where much of it is made into cigarettes. King Mountain sells its tobacco products throughout Washington and in about sixteen other states." *Id.* *King Mountain* thus involved vastly more travel than is at issue here, where Cougar Den is simply bringing fuel from Oregon into Washington. The Washington court's distinction of the case is unpersuasive.

In short, the Ninth Circuit's approach to the right-to-travel clause would have compelled upholding application of Washington's fuel tax here. It provides no basis for the opposite conclusion.

4. The historical understanding of the right to travel creates no right to buy or sell goods tax free

Underpinning much of the Washington Supreme Court's reasoning was the idea that Washington cannot apply its fuel tax to Cougar Den because doing so is inconsistent with the Yakama Nation's historic understanding of the right-to-travel clause. This rationale is flawed both as a general matter and in the context of this case.

This rationale is flawed across the board because off-reservation tax exemptions cannot be based on unwritten understandings. Looking to historical understanding is certainly an important guide to the meaning of terms the parties used, but it cannot justify adding terms that are not there. *See, e.g.*, *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction

regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist . . . ."); *Choctaw Nation of Indians*, 318 U.S. at 432 ("Indian treaties cannot be re-written or expanded beyond their clear terms . . . to achieve the asserted understanding of the parties."). This rule has extra force in the tax context, where this Court has been emphatic that tribes and their members are subject to nondiscriminatory off-reservation taxes "[a]bsent a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696). "[T]ax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n*, 319 U.S. at 606). They must be "clearly expressed" and 'unambiguously proved.'" *Chickasaw Nation*, 534 U.S. at 95 (quoting *Wells Fargo Bank*, 485 U.S. at 354). Historical understanding thus cannot provide a basis for writing a tax exemption into a treaty; there must be "a 'definitely expressed' exemption[.]" *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Choteau*, 283 U.S. at 696).

This rationale is also flawed as applied to this case. Even if historical understanding could sometimes justify rewriting treaty terms to create a tax exemption, it would not do so here, because there is no evidence that the parties understood that they were agreeing to allow the Yakama forever to buy, sell, or possess goods free of taxes.

In reaching a contrary conclusion, the Washington Supreme Court cited several factors. None can justify its conclusion.

First, the Washington court noted that "[a]gents of the United States . . . repeatedly emphasized in negotiations that tribal members would retain the '"same liberties . . . *to go on the roads to market.*"'" Pet. App. 8a (second alteration ours) (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1244 (E.D. Wash. 1997)). But a right "*to go on the roads to market*" says nothing about whether goods brought to market are exempt from taxes. The Washington court cited nothing to suggest that the negotiators discussed or that the Yakama understood that goods the Yakama brought to market by highway would be exempt from tax.

Second, the Washington court said that "[t]ravel was woven into the fabric of Yakama life," and "[t]he treaty was presented as a means to preserve Yakama customs[.]" Pet. App. at 7a, 8a. Therefore, "the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce." Pet. App. 14a. There is a big difference, however, between an understanding that the Yakama could continue their existing trading practices and an understanding that the Yakama would be exempt from future taxes on goods if they transported those goods on interstate highways.

While the parties did discuss preserving historical practices, they also specifically discussed highways that the government would build in the future. As to those highways, the parties made reciprocal commitments, reflected in the treaty text and negotiations. The Tribe agreed that the United States could build future roads through the reservation, and the United States made a corresponding commitment that the Tribe could use

those roads beyond the reservation "in common with citizens of the United States[.]" Treaty with the Yakamas, art. III, 12 Stat. at 953. As to those future highways, the federal negotiators promised equal access, not a permanent tax-free zone, saying: "[Y]ou will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements east of the mountains to our settlements here . . . . You would have the benefit of it as well as the other people."[12]

Third, the Washington court said that the parties "'intended that the Yakamas would retain their right to travel outside reservation boundaries, with no conditions attached.'" Pet. App. 8a (quoting *Yakama Indian Nation*, 955 F. Supp. at 1251). But the quoted district court opinion makes clear that it does not mean "no conditions attached" literally. The court said, for example, that the Yakama are obviously subject to "[l]aws with a purely regulatory purpose," Pet. App. 15a, which would presumably include things like speed limits, seatbelt laws, prohibitions on transporting illegal items, and other "conditions" on highway travel. It is thus clear that the dicta about "no conditions attached" the court used means

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[12] Record of the official proceedings at the Council in the Walla Walla Valley, in U.S. Dep't of the Interior, *Report on Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* 423-24 (1942), https://www.sos.wa.gov/library/publications_detail.aspx?p=116; *see also id.* at 425 ("Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country[.]").

something far narrower than it sounds. *See Yakama Indian Nation*, 955 F. Supp. at 1260 (declaring that Yakamas "must comply with state regulations designed to preserve and maintain the public roads" and "must comply with state registration requirements").

While the phrase "no conditions attached" appears nowhere in the treaty or its negotiating history, the parties were obviously concerned with protecting the freedom to travel against certain types of potential restrictions. But that goal must be viewed in context. At the time of the Treaty, treaties, state laws, and federal policies sometimes barred Indians from leaving their reservations at all, or without specific permission.[13] The Yakama Treaty language offered in good faith by federal negotiators foreclosed those types of restrictions. But that does not mean that it implicitly created a vastly broader right that would preempt future taxation of goods transported off reservation.

Even the Ninth Circuit, which has adopted an extremely broad reading of the Yakama's historical understanding, has not gone as far as Cougar Den demands here. That court has said, based on historical

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[13] *See, e.g.*, Treaty with the Utahs, art. VII, 9 Stat. 984, 985 (Dec. 30, 1849, ratified Sept. 9, 1850, proclaimed Sept. 9, 1850); 1849-1858 Minn. Laws p. 842; 1845 Mo. Laws p. 578; U.S. Dep't of the Interior, *Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 24 (1892), http://digital.library.wisc.edu/1711.dl/History.AnnRep92; U.S. Dep't of the Interior, *Fifty-Seventh Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior* 86 (1888), http://digital.library.wisc.edu/1711.dl/History.AnnRep88.

understanding, that "the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees *for that use*." *Cree*, 157 F.3d at 769 (emphasis added). But even if that conclusion is correct, Washington's fuel tax is not a tax *for use of the highway*, it is a tax for possessing fuel.

In short, the right to travel is clearly protected by the Treaty and was certainly important to the Yakama. But nothing in the Treaty or its negotiating history shows that the Yakama understood that they would forever be able to transport goods to and from their reservation without paying taxes that might apply to those goods.

C. A Ruling for Cougar Den Would Undermine Critical State and Federal Taxing Authority and Is Unnecessary to Protect Tribal Authority

Cougar Den's position, adopted by the Washington Supreme Court, is that any trade it conducts over public roads cannot be taxed. *See* Pet. App. 16a ("[A]ny trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty."). If this Court accepts that principle, the consequences for state and federal taxing powers will be immense. And while such a ruling would certainly benefit the Yakama, it would disadvantage other tribes and is entirely unnecessary to protect tribal authority.

This case amply illustrates what is at stake in this Court's interpretation of the Yakama Treaty. In just seven months in 2013, Cougar Den avoided several million dollars in Washington fuel taxes. In

the years since, Cougar Den has avoided over $40 million more. If the Court holds that Cougar Den's tax avoidance is protected under the Yakama Treaty, Washington will eventually lose hundreds of millions of dollars in fuel tax revenue just from Cougar Den's continuation of its current conduct.

Even more troubling if the Court accepts Cougar Den's position is that the company will be free to expand its business throughout Washington and nationwide. Cougar Den could import fuel from Oregon and sell it to gas stations throughout Washington, decimating Washington's fuel tax regime and the primary source of funding for transportation infrastructure in Washington. And there is no practical way for the State to amend its fuel tax system to address this problem. Beyond Washington, Cougar Den is already licensed to export fuel from Idaho and Nevada. If use of a public road shelters the Yakama from state taxes, they may obtain fuel tax-free in these states, transport the fuel into other states, and evade the recipient state's taxes. Another Yakama-owned company is already attempting to ship fuel from Nevada into California. *See Salton Sea Venture, Inc. v. Ramsey*, 2011 WL 4945072 (S.D. Cal. Oct. 18, 2011).

The ramifications of accepting Cougar Den's position are not limited to fuel taxes. Stretching the treaty language to preempt taxation of "any trade, traveling, and importation that requires the use of public roads," suggests that the Yakama may skirt a host of non-discriminatory taxes on off-reservation activity. The most obviously imperiled would be other taxes that apply to the first possession of goods in a state. In Washington, for example, the State's

hazardous substance tax and petroleum products tax apply upon first possession in Washington. Wash. Rev. Code § 82.21.030(1); Wash. Rev. Code § 82.23A.020(1). Both taxes are dedicated to environmental clean-up. Wash. Rev. Code § 82.21.030(2); Wash. Rev. Code § 82.23A.020(2). But the Yakama would surely argue that other taxes related to trade done by highway, such as sales taxes on goods transported by highway or taxes on businesses engaged in highway trade, are also exempt. *See, e.g.*, Wash. Rev. Code § 82.08.020; Wash. Rev. Code § 82.04.220.[14]

The impact on taxation of tobacco products is particularly staggering. Like most states, Washington imposes a steep tax on the first possession of cigarettes in the state. Wash. Rev. Code § 82.24.020; Wash. Rev. Code § 82.26.020.[15] The federal government also imposes a variety of taxes and fees on cigarettes, including a hefty tax on tobacco products when they are removed from a manufacturer's warehouse. 26 U.S.C. §§ 5701-5703.[16] In

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[14] Tax Foundation, *Unpacking the State and Local Tax Toolkit: Sources of State and Local Tax Collections* (June 2017), https://taxfoundation.org/toolkit-sources-state-local-tax-collections/.

[15] Tax Foundation, *How High Are Cigarette Tax Rates in Your State?* (Jan. 25, 2018), https://taxfoundation.org/state-cigarette-tax-rates-2018/.

[16] Washington's tax rate on a carton of 200 cigarettes is $30.25 ($3.025 per 20-cigarette pack). Wash. Rev. Code §§ 82.24.020(1), .026. The federal tax rate on a carton of 200 cigarettes is approximately $10.00 to $20.00 ($1.00-$2.00 per pack), depending on the size and weight of the cigarettes. *See* 26 U.S.C. § 5701(b).

addition to bringing in considerable state and federal tax revenue, cigarette taxes further the government's interest in protecting public health by reducing tobacco use. *See* Centers for Disease Control & Prevention, *Use of Tobacco Stamps to Prevent and Reduce Illicit Tobacco Trade* (May 29, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6420a2.htm (reporting that tobacco use is the leading cause of preventable death in the United States).

If the Yakama can escape state and federal taxation of cigarettes transported by highway, they will be empowered to distribute untaxed cigarettes nationwide. This is not a hypothetical scenario. King Mountain Tobacco, a company incorporated under the laws of the Yakama Nation, has been in litigation with the federal government, the State of Washington, and the City and State of New York regarding its refusal to pay federal, local, and state taxes on cigarettes that it transports by highway, off-reservation.[17]

Accepting Cougar Den's argument would not only seriously impair state tax collection, it would also give Yakama businesses an unfair advantage over

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[17] *See, e.g.*, *King Mountain Tobacco Co. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *vacated*, 843 F.3d 810 (9th Cir. 2016); *United States v. King Mountain Tobacco Co.*, 2015 WL 4523642 (E.D. Wash. July 27, 2015), *appeal docketed*, No. 16-35956 (9th Cir. Nov. 17, 2016); *United States v. King Mountain Tobacco Co.*, 2014 WL 279574 (E.D. Wash. Jan. 24, 2014), *appeal docketed*, No 16-35607 (9th Cir. July 29, 2016); *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1542 (2015); *City of New York v. King Mountain Tobacco Co.*, No. 2:10-cv-5783 (E.D.N.Y. 2010); *New York v. Mountain Tobacco Co.*, 953 F. Supp. 2d 385 (E.D.N.Y. 2013).

both non-Indian businesses and businesses owned by members of the twenty-eight other tribes in Washington and other tribes nationwide. The Yakama should not be allowed to use an untenable treaty interpretation to market a tax exemption throughout the country. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (rejecting attempt to use "[p]rinciples of federal Indian law . . . to market an exemption from state taxation").

Cougar Den's attack on Washington's fuel tax system is particularly unfortunate given the collaborative relationship Washington has developed in recent years with other tribes as to fuel taxes. Other than the Yakama Nation, every tribe in Washington that has a gas station within its reservation has a fuel tax agreement with the State. Under those agreements, the tribes purchase fuel from taxpaying, state-licensed fuel sellers. Wash. Rev. Code § 82.38.310(3)(a) (2018). The tribes report their purchases and generally receive 75% of the state fuel tax revenue on the fuel they purchase to use for transportation and public safety needs.[18] Collecting fuel taxes has become a source of cooperation for Washington State and tribes, rather than a source of conflict. *See, e.g., Auto. United Trades Org. v. State*, 183 Wash. 2d 842, 851, 357 P.3d 615 (2015) (explaining that because of the fuel tax agreements, "the State and the tribes seem to have largely settled

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[18] Wash. State Dep't of Licensing, *Tribal Fuel Tax Agreement Report* 2 (Jan. 2018), https://www.dol.wa.gov/about/docs/leg-reports/2017-tribal-fuel-tax-agreement.pdf (reporting for 2016).

. . . their conflicts over fuel taxes"). Cougar Den would upend that.

Finally, if the Yakama Treaty precludes state taxation of goods carried over highways, it places a cloud over the state's ability to regulate Yakama use of highways in other ways as well. Rules like licensing requirements, truck weight limits or other safety rules, and even speed limits arguably would be preempted. Rules regulating the transportation of goods are even more obviously imperiled. For example, Washington protects its vitally important apple crop from some pests by prohibiting certain fruit from being hauled from a quarantined area through a pest-free area. Wash. Admin. Code § 16-470-105 (2018). If carrying goods over the highways immunizes the Yakama from any state oversight, they would be free to ignore such regulations.

The Washington Supreme Court brushed aside this concern, saying "[l]aws with a purely regulatory purpose can be validly applied" regardless of the treaty. Pet. App. 15a. But this facile assurance has no basis in precedent. To the contrary, when this Court announced the guiding principle that "Indians going beyond reservation boundaries" are subject to State laws "[a]bsent express federal law to the contrary," the very next sentence said: "That principle is as relevant to a State's tax laws as it is to state criminal laws . . . ." *Mescalero Apache Tribe*, 411 U.S. at 148-49. In other words, the interpretive rule is the same whether the state law at issue is a tax law or a "purely regulatory" criminal law. The distinction invented by the Washington court is baseless, and the truth is that the enormously broad treaty right it

announced, untethered from treaty text, threatens a wide range of state taxes and regulations.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

RESPECTFULLY SUBMITTED.

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IN THE
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WASHINGTON STATE DEPARTMENT OF LICENSING,
Petitioner,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,
Respondent.

On Writ of Certiorari
to the Supreme Court of Washington

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QUESTION PRESENTED

Whether the Yakama Treaty of 1855 preempts Washington's fuel taxes, Wash. Rev. Code §§ 82.36, 82.38 (2013), as applied to Respondent's transportation of fuel between the Washington state line and the Yakama Indian Reservation?

CORPORATE DISCLOSURE STATEMENT

Respondent is Cougar Den, Inc. There is no parent company or publicly held company owning 10% or more of its stock.

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INTRODUCTION

In 1855, the Yakama Nation entered into a treaty with the United States in which the Yakamas relinquished the vast majority of their land. In exchange, the Yakamas "secured," among other things, "the right, in common with citizens of the United States, to travel upon all public highways." That "right to travel" encompasses the right to transport goods for purposes of trade: According to an unchallenged factual finding, the United States negotiators' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." J.A. 70a.

This Court has never construed the Treaty's right-to-travel provision. But it has construed the Treaty's next sentence, which "further secured ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." This Court has held that this similarly worded provision bars the State from "charg[ing]" the Yakama "for exercising the very right their ancestors intended to reserve," and so prohibited the State from imposing a nondiscriminatory fishing-license fee on Yakama fishermen. *Tulee v. Washington*, 315 U.S. 681, 685 (1942). It follows from *Tulee* that the Yakamas are exempt from taxes arising from exercising their rights under the right-to-travel provision—a conclusion reached by a federal district court opinion that the State is collaterally estopped from challenging.

Respondent Cougar Den, Inc., a Yakama corporation, buys fuel in Oregon, transports it to the Yakama Reservation in Washington, and sells it to Yakama-owned fuel stations. A 27-mile gap exists between the Washington/Oregon state line and the reservation entrance. Respondent transports fuel on a highway spanning that gap.

It is undisputed that if that gap did not exist—if the reservation reached the Washington state line—the State could not tax Respondent. In that scenario, Respondent's travel within Washington would take place entirely on the Yakama Reservation. And, under this Court's cases, the State would be forbidden from taxing Respondent's on-reservation economic activity.

But the State contends that Respondent's travel between the state line and the Yakama Reservation opens the door to imposing its fuel tax. The tax, by its terms, applies to Respondent because Respondent "import[s]" fuel. According to the State, the tax may be imposed because the importation takes place at the state line—before Respondent has reached the reservation entrance.

For every other Tribe in Washington, a tax triggered by off-reservation importation would not be preempted: No other Tribe secured any relevant off-reservation rights that would protect them from the tax. But the Yakamas, alone among Washington's Tribes, negotiated not only a reservation, but also a right to travel on off-reservation highways. And here, the *only* thing Respondent is doing off the reservation is traveling on the highway to bring goods to market on the reservation—which is treaty-protected activity.

The Treaty thus prohibits the State from taxing that activity.

The State's core theory is that its tax is "on" possession of fuel, rather than "on" transportation. But even if the tax were "on" possession, it would be preempted. If Respondent has a right to transport fuel tax-free, it necessarily has a right to possess fuel in connection with that transportation tax-free, because it is impossible to transport fuel without possessing it. The State emphasizes that the tax is imposed on other entities, such as refineries, who possess fuel without transporting it. But this is irrelevant. Preemption under the Treaty turns on whether the *tribal members* are engaging in protected activity, not on whether the tax applies to other entities not engaging in that activity.

Even if preemption turned on whether the tax was "on" possession or "on" transportation, Respondent must still prevail. By its express terms, the statute levies a tax on the "import[ation]" of fuel, not "possession." Thus, the Washington Supreme Court held that the state tax was "on" importation, and hence "on" transportation. That interpretation of State law binds this Court. And under this Court's cases—including a case dealing with a fuel tax substantively indistinguishable from the tax here—that point is dispositive in establishing preemption.

The State contends that Respondent's proposed rule will preclude the State from taxing the Yakamas' goods at *any* point if those goods *were* or *will be* transported on the highway at some other time. The State is wrong. The State can tax any event (such as a

sale or purchase of goods) distinct from the exercise of treaty-protected rights. The Treaty is implicated only if the sole taxable event is the Yakamas' transportation of themselves or goods. Thus, the State is free to restructure its tax so that it is not triggered by the exercise of treaty-protected activity. In its current form, however, the tax is preempted.

STATEMENT OF THE CASE

A. The Yakama Treaty

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian Tribe. Pet. App. 62a. The modern Yakama Nation was formed in 1855 when the United States executed a treaty with the 14 tribes and bands that would, from that day forward, compose the Nation. J.A. 60a. As the Nation's founding charter, the Treaty is a sacred document to the Nation's members, "embod[ying] spiritual as well as legal meaning for the tribe." *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1237-38 (E.D. Wash. 1997) ("*Yakama Indian Nation*"), *aff'd sub nom.*, *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

In the Treaty, the Yakama Nation surrendered 10 million acres—over 90% of its territory—to the United States. Treaty with the Yakamas, art. I, 12, June 6, 1855, Stat. 951. In exchange, the Treaty "secured to the Yakamas" certain "basic rights ... that encompass their entire way of life." *Yakama Indian Nation*, 955 F. Supp. at 1238. Three of those rights are relevant here.

First, Article II created a reservation "for the exclusive use and benefit" of the Yakama Nation, within what is now Washington state.

Second, Article III, Paragraph 1 secured the right to travel:

> And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with the citizens of the United States, to travel upon all public highways.

Third, Article III, Paragraph 2 secured the right to fish:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory ....

The right to travel was critical to the Yakama Nation. Before the Treaty, travel was "an intrinsic ingredient of virtually every aspect of Yakama culture," and "was particularly important for the purpose of trade." *Yakama Indian Nation*, 955 F. Supp. at 1238. "A network involving the exchange and interchangeability of goods and services existed

between Indian tribes of the Northwest and surrounding areas, and the Yakamas were a central part of the network ...." *Id.* This occurred in part because "[t]he Yakamas' way of life depended on goods that were not available in the immediate areas"—thus obtainable only via trade. *Id.*

To protect that crucial trade, the Yakamas, alone among Washington's Tribes, negotiated a specific Treaty provision regarding off-reservation travel.[1] At the treaty negotiations, "the Yakamas' right to travel ... was repeatedly broached." *Id.* at 1243. Isaac Stevens, the Governor of Washington Territory, persuaded the Yakamas to accept the proposed reservation in part because of its proximity to public highways: "You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market." *Id.* at 1244 (quoting Official Treaty Proceedings at 64). He explained, "You will be allowed to go on the roads to take your things to market ... All that outside the reservation." *Id.* (emphasis omitted) (quoting Official Treaty Proceedings at 67). He assured the Yakamas that this was the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Id.* (quoting Official Treaty Proceedings at 69).

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[1] Only two other Indian treaties, involving tribes in other States, contain similar provisions. U.S. Br. 2 n.1.

B. Washington's Fuel Tax

Washington imposes a tax on wholesale suppliers of fuel. Who must pay the tax depends on how the fuel is transported into the State.

If the fuel is brought into the State "by pipeline or vessel," it is defined as fuel imported via "bulk transfer." Wash. Rev. Code § 82.36.010(3), (4) (2012).[2] That fuel is taxed, *not* when it is imported into the State, but instead when it is either first sold, *id.* § 82.36.020(2)(f), or first "removed" from a "terminal" or "refinery" and loaded onto a "truck, trailer, railcar," or other means of ground transportation, *id.* §§ 82.36.020(2)(a), (b), 82.36.010(22). Thus, this fuel is generally not taxed when it is first possessed in the State, but rather only when some subsequent sale or transfer occurs.

But fuel that is brought into the state via trucks or railcars is treated differently. Fuel that is imported "not by bulk transfer" is taxed when it "enters into," *i.e.*, is imported into, the State. *Id.* § 82.36.020(2)(c)(2).[3] Accordingly, a "[m]otor vehicle fuel importer" is

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[2] Respondent was taxed for importing both "motor vehicle fuel" and "special fuel." *See* Wash. Rev. Code chs. 82.36 (motor-vehicle fuel), 82.38 (special fuel). However, the relevant provisions of the two chapters are identical. Respondent therefore cites only the motor-vehicle fuel tax provisions.

Except where otherwise noted, citations to the Washington Revised Code are to the 2012 version, in effect when the relevant events occurred.

[3] If a pipeline or barge owner is *unlicensed*, it would also pay the tax at importation. *See id.* § 82.36.020(2)(c)(1).

defined as "a person who imports motor vehicle fuel into the state *by a means other than the bulk-transfer terminal system*," *i.e.*, "a railcar, trailer, truck, or other equipment suitable for ground transportation." *Id.* §§ 82.36.010(16) (emphasis added), 82.36.010(4). Thus, fuel that is imported into the state via truck or railcar—and *only* that fuel—is taxed as it is transported into the State.

Finally, not all wholesaler suppliers of fuel are taxed. Exported fuel, or imported fuel intended for a destination outside Washington, is not taxed. *Id.* § 82.36.230.

C. Respondent Cougar Den

Respondent Cougar Den, Inc. is a private business organized under the laws of the Yakama Nation and owned by Kip Ramsey, an enrolled member of the Yakama Nation. Pet. App. 63a.

In 1993, the Yakama Nation appointed Cougar Den as the Yakama Nation's sole agent "for the purpose of obtaining petroleum products for sale and delivery to its members." J.A. 99a-100a. Cougar Den verifies that it sells to tribal businesses. Clerk's Papers 471, 474-79. Cougar Den collects and remits tribal taxes to the Yakama Nation. J.A. 99a.

Cougar Den began hauling fuel from Oregon to the Yakama Reservation in 2013. Pet. App. 63a-64a, J.A. 27a-28a. Between Oregon and the Reservation is a 27-mile strip of Washington state land that Cougar Den's trucks must cross. Pet. App. 64a. Cougar Den's trucks travel across that strip of land exclusively on public highways. *Id.* As shown below, that strip of land is

part of the Ceded Area of the Yakama Nation—*i.e.*, the land that the Yakamas ceded to the United States in the Treaty. *Id.*

D. Course of Proceedings

In December 2013, the Washington State Department of Licensing assessed Respondent and Kip Ramsey $3,630,954.61 in unpaid fuel taxes and penalties for importing fuel from Oregon into Washington without paying the State's fuel tax or possessing a state import license. Pet. App. 65a.

Respondent appealed the assessment to a state administrative law judge. The ALJ held that the Assessment was an impermissible restriction on travel under the Treaty. *See* Resp. App. 13-14.

The Department sought internal review of this order, which was reversed by the Department's

Director. Pet. App. 44a-61a. Respondent in turn appealed to the state Superior Court. The Superior Court reversed the Director, finding that the Assessment violated the Treaty and that the Director violated Washington's Appearance of Fairness doctrine by not recusing herself given that she had previously acted for the State against the Yakamas in a related fuel-tax dispute. *Id.* at 30a-35a.

The Washington Supreme Court affirmed on the first ground by a 7-2 vote. *Id.* at 1a-16a. Interpreting Ninth Circuit precedent on the right-to-travel provision, the Court distinguished between taxes or restrictions on "the right to travel (driving trucks on public roads) for the purpose of transporting goods to market," *id.* at 12a (quotation marks omitted) (quoting *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014)), which are preempted, and taxes or restrictions on "trade [that] does not involve travel on public highways," *id.* at 13a, which are not.

The Court concluded that Washington's fuel tax was preempted under that standard. The State had argued that "the taxes are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways." *Id.* Two dissenting Justices agreed with that interpretation of the state statute, contending that "Washington's fuel excise tax burdens trade—the first instance of wholesale possession of fuel within Washington—not fuel transport." *Id.* at 17a.

The Court rejected that interpretation of the state statute, instead holding that the statute "taxes the importation of fuel, which is the transportation of fuel."

Id. at 16a. Thus, the Court reasoned, "[h]ere, travel on public highways is directly at issue because the tax [is] an importation tax." *Id.* at 13a. The Court accordingly held that the Treaty preempted the tax. *Id.* at 16a.

SUMMARY OF ARGUMENT

The Yakama Treaty's right-to-travel provision preempts the application of the State's fuel tax to Respondent.

I.A Two sources of authority establish the framework for resolving this case. The first is the line of this Court's cases construing the Treaty's right-to-fish provision, which appears in the same Article of the Treaty as the right-to-travel provision. The second is the decision containing the most extensive analysis of the right-to-travel provision: *Yakama Indian Nation*, 955 F. Supp. 1229. *Yakama Indian Nation* binds the State in this case. The Superior Court below explicitly incorporated *Yakama Indian Nation*'s factual findings into the record and held that the State was collaterally estopped from challenging those findings. The State never challenged those findings and waived any objection to the Superior Court's collateral estoppel determination.

I.B Those sources of authority establish four bedrock propositions regarding the right-to-travel provision. *First*, it protects the right to transport goods for purposes of trade. *Second*, it secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected travel. *Third*, it applies even to nondiscriminatory fees and

taxes. *Fourth*, it preempts taxes and fees, but does not preempt certain regulatory provisions.

II.A These principles support two alternative bases for finding preemption in this case. As Part II explains, the tax is preempted because the Treaty secures Respondent's pre-existing freedom from taxation. Respondent's transportation of goods on the highway is treaty-protected activity, and, at the time of the Treaty, the transportation of goods would not have been taxed. Indeed, the State of Washington did not exist. Further, all of Respondent's transportation of fuel occurs in the Ceded Area—that is, the land the Yakamas ceded to the United States in the Treaty. Before the Treaty, when this land was still the Yakamas' land, the Yakamas would have been *immune* from tax. The Treaty ensures that if the Yakamas engage in their treaty-protected right to travel, they continue to be free from tax. Thus, Respondent may transport fuel to the reservation without incurring a tax obligation.

II.B This analysis vindicates Respondent's right to travel by ensuring that the State cannot exploit that travel as a basis for imposing a tax that could not be imposed based on on-reservation activity. The Treaty secures *both* a reservation *and* the right to off-reservation travel. The natural reading of the Treaty is that just as the Yakamas may engage in economic activity on the reservation without being taxed, they may transport goods to and from the reservation without being taxed.

II.C That does not mean that *any* activity connected to highway travel cannot be taxed. Rather,

preemption should turn on whether a Yakama is *only* exercising its treaty-protected right to travel—in which case the tax is preempted. If not—if the Yakama is engaging in a distinct activity—that activity may be taxed. Here, the tax is preempted because Respondent is *only* exercising its right to transport goods on the highway.

II.D The State contends that the tax is "on" possession rather than "on" transportation. It emphasizes that refineries must pay the tax when they possess fuel, even if they do not transport it. But this is irrelevant. What matters for preemption is that *Respondent's* travel is burdened by the tax.

III.A Alternatively, this Court's right-to-fish cases and *Yakama Indian Nation* at least establish that a tax *triggered* by treaty-protected activity is preempted. Here, the state statute expressly provides that it is triggered by importation, and the state supreme court construed it as such. The claim that the statute is triggered by possession rather than importation is an improper challenge to the state supreme court's interpretation of state law.

III.B The State and the United States ask the Court to conduct a holistic analysis of what the tax is "on." They argue that the tax should holistically be viewed as effectively taxing the insertion of fuel into the stream of commerce. This analysis is irreconcilable with *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), which addressed a fuel tax statute virtually identical to the statute here. In *Wagnon*, this Court held that preemption should turn on the taxpayer's activity that formally triggers the tax, not a

holistic analysis of the effective target of the tax. Here, the activity that triggers the tax is Respondent's importation, so it is preempted under *Wagnon*.

III.C The State's core intuition is that—contrary to the state supreme court's interpretation of the statute—possession of fuel is the Legislature's *target* for the tax. But the target for the tax can be framed in multiple ways: the Legislature can plausibly be said to be targeting possession of fuel, *or* off-reservation transportation of fuel, *or* on-reservation sales of fuel, *or* merely the goal of maximizing funds for highway repair. Rather than engage in an indeterminate analysis of a tax's "target," the Court should hold that preemption turns on the trigger for the tax.

III.D The State's next argument—that the tax applies to transportation, but not transportation *on highways*—is even weaker. The only importation the statute actually taxes is importation on the highway. And even if the statute did tax importation via other means, that would be irrelevant. The burden on the right to travel on the highway would not be lessened by the fact that the statute also applies to travel by other means.

IV.A. The State maintains that a treaty cannot preempt a tax unless it contains a "clear statement" of preemption. This is simply wrong. The State's position is irreconcilable with this Court's right-to-fish cases and *Yakama Indian Nation*, has no principled basis, and is inconsistent with numerous longstanding tenets of Indian law. No case supports the State's purported clear-statement rule; all of the State's cited cases

applying a "clear statement" rule involve interpretations of federal statutes, not treaties. .

IV.B. The State's two key cases similarly do not support its position. The first, again, turned on interpretation of a federal *statute*. In the other, the treaty expressly disclaimed that it applied outside of reservation boundaries.

V. The State's practical concerns are unwarranted. Respondent's position will not jeopardize the State's fuel or cigarette tax regimes, given that the State may tax the importation of goods by any other Tribe, the off-reservation sale of goods by Respondent, or the on-reservation sale of goods to any non-Indian.

ARGUMENT

I. THIS COURT'S RIGHT-TO-FISH PRECEDENTS, AND *YAKAMA INDIAN NATION*, ESTABLISH THE FRAMEWORK FOR RESOLVING THIS CASE.

This brief will first address the key sources of authority relevant to the Yakama Treaty's right-to-travel provision, and the principles established by those authorities.

A. This Court's right-to-fish precedents, and *Yakama Indian Nation*, are the authorities most relevant to this case.

This Court has never construed the Yakama Treaty's right-to-travel provision. Two sources of authority, however, are relevant to the interpretation of that provision.

The first source of authority is this Court's line of cases construing the Treaty's right-to-fish provision. The right-to-travel provision, in Article III, Paragraph 1, "secure[s] ... the right, in common with the citizens of the United States, to travel upon all public highways." The right-to-fish provision, in Article III, Paragraph 2, "further secure[s] ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." These two provisions have two textual similarities: they both "secure" an off-reservation "right," and that right is "in common with" non-Indian citizens. Thus, this Court's cases construing those terms in the right-to-fish provision are directly relevant to the interpretation of the same terms in the right-to-travel provision.

The second source of authority is *Yakama Indian Nation*. The *Yakama Indian Nation* litigation concerned whether the Treaty preempted the application of Washington licensing and permitting fees to Yakama-owned logging trucks. In an initial order, the District Court held that the Treaty preempted the fees as a matter of law. *Cree v. Waterbury*, 873 F. Supp. 404, 433-34 (E.D. Wash. 1994). The Ninth Circuit, however, reversed, concluding that fact-finding was necessary. *Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir. 1996). Because the "scope of the highway right" depended on "the parties' intent when they signed the treaty," the court directed the District Court "to examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed." *Id.* at 1403, 1405.

On remand, the District Court conducted a bench trial. The court made extensive findings on the scope of the Yakama Treaty's right-to-travel provision and again concluded that the Yakama Treaty's right-to-travel provision preempted the fees. *Yakama Indian Nation*, 955 F. Supp. at 1260. The Ninth Circuit affirmed. *Cree v. Flores*, 157 F.3d 762, 774 (9th Cir. 1998). As explained below, the *Yakama Indian Nation* findings are exceptionally thorough and highly relevant to this case.

Nevertheless, the State's brief invites this Court to ignore *Yakama Indian Nation*, observing that the Court is "of course not bound" by the Ninth Circuit's decisions. Pet. Br. 28-29 & n.9; *see also* U.S. Br. 28-30. The State is, however, bound by *Yakama Indian Nation*'s findings, and they should be treated as established for purposes of this case.

First, the State has never previously challenged *Yakama Indian Nation* in this litigation, as both Respondent and the United States pointed out at the certiorari stage. BIO 33 (noting that the State has never "disputed the historical findings of the federal court in [*Yakama Indian Nation*], though the [State] itself was a party to that case"); U.S. Cert. Br. 19 ("[B]oth parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the 1855 Treaty ....").

Second, and more importantly, the Superior Court held below that the State is collaterally estopped from challenging *Yakama Indian Nation*'s findings—a determination the State never appealed.

In *Yakama Indian Nation*, both Kip Ramsey (who owns and operates Respondent) and the Yakama Nation were named plaintiffs; indeed, Mr. Ramsey personally testified. *See* 955 F. Supp. at 1261 (Finding 5); J.A. 57a-58a. The State was the losing defendant. Thus, at the agency level in this case, Respondent requested that *Yakama Indian Nation*'s findings be inserted into the agency record, and argued that the State should be collaterally estopped from challenging them. Clerk's Papers 257-58. The State did not object, and the agency (Petitioner in this Court) granted Respondent's request.

On appeal to the Superior Court, Respondent again argued that *Yakama Indian Nation* was "preclusive in this case and the Department did not object to that" below. July 10, 2015 Tr. 2. Again the State did not object, and the Superior Court issued an order stating: "[T]he Court incorporates by reference the Findings of Fact of [*Yakama Indian Nation*].... To examine the historical context of the Treaty, the Director should have looked to the Findings of Fact of [*Yakama Indian Nation*] .... Such Findings are preclusive in this case." Pet. App. 33a-34a.

The State did not challenge this preclusion ruling in the Washington Supreme Court, even though Respondent relied on it in its brief. *See* Cougar Den Br. 18 n.48 (Wash. Jan. 25, 2016) ("Cougar Den previously argued that the findings in [*Yakama Indian Nation*] are preclusive in this case.... The [State] did not challenge that argument."). Thus, the Washington Supreme Court stated that the "factual record regarding the treaty interpretation of the historical

meaning of the right to travel relied on below was developed in a federal action, [*Yakama Indian Nation*]." Pet. App. 6a. In its petition for certiorari, the State again did not challenge the collateral-estoppel ruling. Having never challenged *Yakama Indian Nation* below—and having actually been held to be precluded from doing so, and failing to appeal that determination—the State cannot do so now. As such, the Court should take that ruling—and *Yakama Indian Nation*'s factual findings—as established.

B. This Court's right-to-fish precedents, and *Yakama Indian Nation*, establish four critical principles.

This Court's right-to-fish precedents and *Yakama Indian Nation* establish four propositions about the Yakama Treaty's right-to-travel provision which guide the outcome of this case:

- It protects the right to the right to transport goods for purposes of trade.
- It secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected activity.
- It applies even to *nondiscriminatory* fees and taxes.
- It preempts fees and taxes, but does not preempt certain regulatory provisions.

The legal basis for each principle is explained in turn.

1. The right-to-travel provision protects the right to transport goods for purposes of trade.

The first established proposition is that the Treaty's right-to-travel provision secures the Tribe's right to transport not only themselves, but also goods on the highway for purposes of trade.

Yakama Indian Nation reached that conclusion based on an extensive analysis of the Treaty's historical backdrop. The Court explained that "[p]rior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other ... tribes," as well as with "non-Indians, particularly the Hudson's Bay Company." 955 F. Supp. at 1262-63 (Findings 23, 25); J.A. 61a-62a. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to ... trade." *Id.* at 1264 (Finding 43); J.A. 65a. When negotiating the Treaty, U.S. delegates specifically promised that the right to travel *with goods for trade* would be secured. Governor Stevens stated: "You will be allowed to go on the roads to take your things to market ... All that outside the reservation." *Id.* at 1244 (quoting Official Treaty Proceedings at 67) (emphasis omitted). Stevens called this the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Id.* (quoting Official Treaty Proceedings at 69).

Based on this record, *Yakama Indian Nation* found that Stevens "unconditionally guaranteed that the Yakamas would have the right to take their ... goods to market." *Id.* at 1253. The United States negotiators'

"statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." *Id.* at 1265 (Finding 66); J.A. 70a.

It could hardly be any other way. The Treaty protects the "right to travel"—not the "right to travel without carrying any goods." Moreover, during treaty negotiations, the Yakamas specifically sought to secure the right to travel while carrying goods with them to market—*i.e.*, the right to transport goods to market—and were specifically promised that the Treaty did just that. The Yakama could not have understood the right they had secured to permit them to travel empty-handed, but not with any tools, provisions, or other goods. Thus, the right to travel encompasses the right to transport goods to market.

2. The right-to-travel provision secures preexisting rights, including the right to be free from fees and taxes arising from treaty-protected activity.

The second established proposition is that the Yakama Treaty secures the Yakamas' *preexisting* right to travel—including any preexisting freedom from tax. Thus, if the Yakamas could have, before the Treaty, exercised their right to travel tax-free, the Treaty ensures that this freedom from taxation remains in force.

The text of the Yakama Treaty establishes that the Treaty protects a preexisting right. The Treaty states

that it is "securing the right" to travel, implying that this right already existed. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) ("The very text of the Second Amendment implicitly recognizes the preexistence of the right and declares only that it 'shall not be infringed.'").

This Court's cases interpreting the Yakama Treaty's right-to-fish provision confirm that the Treaty preserves pre-existing rights. That provision similarly "secure[s] ... the right of taking fish at all usual and accustomed places." *United States v. Winans*, 198 U.S. 371, 378 (1905). In *Winans*, the Court held the right to fish secured by the Treaty "was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment." *Id.* at 381. Thus, "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id.* Again, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1977), the Court said: "The fishing clause speaks of 'securing' certain fishing rights, a term the Court has previously interpreted as synonymous with 'reserving' rights previously exercised." *Id.* at 678.

In *Tulee v. Washington*, 315 U.S. 681 (1942), this Court applied that principle to find that the right-to-fish provision preempted a nondiscriminatory licensing fee that Washington imposed on all fishermen, including Yakama fishermen. The Court reasoned that "[e]ven though this [fee] may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors

intended to reserve." 315 U.S. at 684-85. In other words, the Yakamas could fish, fee-free, before the Treaty; therefore, by "securing" their right to fish, the Yakamas' right to fish fee-free remained in force.

Although *Tulee* referred to a fishing "fee" rather than a fishing "tax," *Tulee* also establishes that the Treaty preempts taxes on fishing. There is no economic difference between the two. Indeed, *Tulee* emphasized that the fee constituted an obligation to pay for "the support of the state government and its existing public institutions," *id.* at 685—a precise description of a tax. Further, this Court subsequently grounded *Tulee*'s holding in the principle that a State ordinarily lacks the "power to *tax* the exercise of a federal right," because "[t]he power to *tax* the exercise of a privilege is the power to control or suppress its enjoyment." *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 401 n.14 (1968) (emphasis added) (quotation marks omitted).

In *Yakama Indian Nation*, the District Court drew on these authorities to hold that the Treaty's similarly worded right-to-travel provision similarly secured the right to use the highway fee-free. It explained that "the Treaty itself 'secures to' the Yakamas their right to travel the public highways. The plain meaning of this term constitutes a guarantee of a right already possessed." 955 F. Supp. at 1253. It noted that "the Treaty 'further secures' the right to take fish and hunt, indicating an intent that the right to travel was secured in the same manner as the right to take fish." *Id.* It found that "[a]t the time of the Treaty the United States did not charge fees for travel on its public

highways in the Washington Territory." *Id.* at 1263 (Finding 32); J.A. 63a. Further, no United States negotiator "intended to levy a tax against tribes for the use of public roads." *Id.* at 1250.

Therefore, taking the first two established principles together, *Yakama Indian Nation* held that the right-to-travel provision "provides the Yakama Indian Nation with the right to travel on all public highways without being subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." *Id.* at 1262 (Finding 22); J.A. 61a.

3. The right-to-travel provision applies to nondiscriminatory fees and taxes.

The third established proposition is that the Yakama Treaty preempts even *nondiscriminatory* statutes burdening the right to travel.

The Treaty secures the Yakamas' right to travel on public highways "in common with citizens of the United States." The State suggests that in light of the "in common with" language, the right-to-travel provision preempts only laws that discriminate against Yakamas, not those applying to Indians and non-Indians alike. Pet. Br. 28-29 n.9; *see also* U.S. Br. 29 n.8. This argument is incorrect. This Court has rejected this argument with respect to the right-to-fish provision, and *Yakama Indian Nation* rejected this argument with respect to the right-to-travel provision.

As noted earlier, the Treaty's right to fish is also granted "in common with citizens of the Territory." This Court has repeatedly rejected the argument that the phrase "in common with" merely means that Indians have the right not to be discriminated against. *Tulee*, for instance, held that a *nondiscriminatory* fishing licensing fee violated the Treaty. 315 U.S. at 684. Likewise, in *Fishing Vessel*, this Court expressly rejected the proposition that "the words 'in common with' ... be read ... as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians." 443 U.S. at 677.

Yakama Indian Nation extends these principles to the right-to-travel provision. There, the District Court made specific factual findings about the "in common with" language in the right-to-travel provision and concluded that the provision protects against nondiscriminatory fees. It held that "no evidence suggests that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." 965 F. Supp. at 1247. "In the Yakama language, the term 'in common with' would suggest public use or general use without restriction. Therefore, as the Yakamas understood this term, no impediment would be placed on their right to travel." *Id.* at 1265 (Finding 63); J.A. 69a. Further, "[n]othing appears in the factual record which would lead the court to interpret the identical public highway language differently than the manner in which the fishery language has been interpreted." *Id.* at 1266 (Finding 71); J.A. 70a-71a.

Instead, the historical evidence showed, the "in common with" language was added not as a limit on the Yakamas' fish and travel, but to make clear that these rights would be exercised "in common with" non-Indians. Prior to 1855, the Yakamas exercised the exclusive right to fish and travel in an area vastly exceeding the area of the present-day Yakama Reservation. The Treaty ensured that off the Yakama Reservation, Yakamas *and* non-Indians would fish in the same streams and travel along the same roads. Thus, the court found, "[t]he most the Indians would have understood, reading the Treaty as a whole and its interpretive Minutes, of the term 'in common with' and 'public' was that *they would share the use of the roads with whites.*" *Id.* at 1265 (emphasis added) (Finding 63); J.A. 69a. That is, "[t]he term 'in common with' in Article III implies that the Indian and non-Indian use will be joint but does not imply that the Indian use will be in any way restricted." *Id.* (Finding 64); J.A. 69a.

4. The right-to-travel provision preempts fees and taxes, but does not preempt certain regulatory provisions.

The fourth established proposition is that the Treaty's right-to-travel provision distinguishes between taxes, which are preempted, and regulatory provisions necessary to protect public safety or to ensure the free and safe use of the highways, which are not. The State suggests Respondent's position would jeopardize such regulatory provisions. Pet. Br. 44. Both the right-to-fish cases and *Yakama Indian Nation* establish that this concern is unfounded.

As noted above, the Treaty's "in common with" language altered the status quo *ante*, extending non-Indian fishing and traveling to areas previously exclusive to the Yakamas. The Treaty hence opened the door to regulatory laws designed to ensure that non-Indians could freely and safely exercise those rights, such as fishing conservation laws and speed limit laws.

Thus, in *Tulee*, this Court held that "[w]hile the treaty ... forecloses the state from charging the Indians a fee," it "leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature." 315 U.S. at 684. In *Puyallup*, this Court confirmed that the State is authorized to enact "a 'regulation' concerning the time and manner of fishing outside the reservation" that is "necessary for the conservation of fish," "as opposed to a 'tax.'" 391 U.S. at 401 n.14 (parentheses and quotation marks omitted). In *Yakama Indian Nation*, the Court similarly held that the Yakamas "must comply with state regulations designed to preserve and maintain the public roads and highways to the extent that those regulations do not impose a fee or surcharge on the Treaty right to travel." 955 F. Supp. at 1287 (Finding 84); J.A. 73a.

II. BECAUSE WASHINGTON'S TAX INFRINGES A PREEXISTING RIGHT THAT THE YAKAMA TREATY PROTECTS, IT IS PREEMPTED, REGARDLESS OF WHETHER IT IS A "POSSESSION" OR "TRANSPORTATION" TAX.

These principles require the Court to find preemption in this case. Washington's tax is preempted because it infringes Respondent's preexisting right to travel on the highway tax-free. This analysis is consistent with a natural reading of the Treaty: that it prevents the State from exploiting Respondent's off-reservation travel to impose a tax that could not be imposed for on-reservation activity. Under this analysis, it is irrelevant whether the tax is "on" possession or "on" transportation: preemption turns on whether the sole basis for the State's taxation of Respondent is Respondent's exercise of treaty-protected rights, not whether the tax can be described, at a higher level of abstract generality, as being a tax "on" something else.

A. Because Washington's tax infringes a preexisting tax exemption, it is preempted.

This case boils down to a straightforward syllogism.

- When Respondent transports fuel from the Washington state line to the reservation, it engages in activity protected by the right-to-travel provision.

- The Yakamas were free from taxation on travel at the time of the Treaty, and the Treaty secures that right.

- Therefore, Respondent has the Treaty right to transport fuel to the reservation tax-free.

First, as explained in Part I, *Yakama Indian Nation* held that transporting goods to market—*i.e.*, causing them to travel to market—is a protected Treaty right. Here, Respondent's *sole* off-reservation act within the State consists of transporting goods—fuel—to market over 27 miles of public highways from the Washington/Oregon state line to the reservation.

Indeed, during Treaty negotiations, Governor Stevens promised the Yakamas that they would "be near the great road," which would allow them to take their goods "down the river ... to market." 965 F. Supp. at 1244. Here, Respondent transports goods on the highway connecting the Yakama Reservation to the Columbia River on the Washington/Oregon state line—the precise travel contemplated by Governor Stevens.

Thus, when Respondent transports fuel to the Yakama Reservation, it exercises its rights under the Treaty.

Second, the Yakamas were free from taxation on travel at the time of the Treaty, and the Treaty secures that right.

As an initial matter, Respondent's transportation of fuel would not have in fact been taxed in 1855. The State has proffered no evidence, and Respondent is

aware of none, that before the Treaty, transportation of goods to market for sale would have resulted in any tax liability for Yakamas. A state tax would have been impossible because the State of Washington did not exist, and there is no record of any federal or territorial tax. That was enough for the court in *Yakama Indian Nation* to find preemption: the court held that because "[a]t the time of the Treaty the United States did not charge fees for travel on its public highways in the Washington Territory," such fees were preempted. *Id.* at 1263 (Finding 32); J.A. 63a.

Here, however, there is an additional argument for preemption. There is more than the mere absence of taxation: Respondent had a preexisting *immunity* from taxation with respect to the travel here. That is because all of Respondent's travel takes place in the Ceded Area—that is, the land that the Yakamas ceded in the Yakama Treaty. Pet. App. 64a.

It is a bedrock tenet of federal Indian law that Indians are immune from state tax based on their activity in Indian country. As this Court has explained, this tenet follows from principles of Indian sovereignty that were already well-established at the time of the Yakama Treaty. *See McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168-69 (1973) (tracing history of Indian tax immunity back to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)). And this tenet retains vitality today. Indeed, this Court has specifically held that Indians are immune from fuel excise taxes triggered by on-reservation sales. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("*Oklahoma*") (holding such a tax

preempted because a State may not "levy a tax directly on an Indian tribe or its members inside Indian country").

In this case, Respondent's travel from the Washington/Oregon state line to the Reservation occurs *solely* within the Ceded Area. Pet. App. 64a. If Respondent had engaged in that travel before the Treaty, it would have been in Yakama territory—and therefore immune from tax.

The right-to-travel provision leaves that tax immunity in place. As explained in Part I, *Tulee* and *Yakama Indian Nation* establish that the Treaty's right-to-travel provision carries forward preexisting tax immunities. In 1855, the Yakamas were immune from state taxation within their preexisting boundaries. Because the right-to-travel provision secures that pre-existing tax immunity with respect to the activities it protects, even today those activities remain immune from tax when undertaken within those pre-existing boundaries.

Of course, in 1855, the state of Washington did not yet exist, so there were no state taxes to be immune from. But the purpose of the Yakama Treaty was to facilitate non-Indians' settlement of the land, with the ultimate goal of incorporation of Washington as a State. By signing the Treaty, the Yakamas paved the way for this to occur. In return, they secured a promise that if they traveled on the highway, they would retain their rights—including immunity from state taxation.

To be sure, in 1855, the Yakamas could not literally have traveled along the highway Respondent uses in

2018—that highway had not been built. The Yakamas of 1855 traveled on Indian trails, not asphalt roads. But the Treaty, by its terms, protects the right to travel on all public highways, including those that had not been built in 1855. As explained in *Yakama Indian Nation*, "at the treaty negotiations, a primary concern of the Yakamas was that they retain freedom of movement ... whether they did so by Indian trails or by the public roads that the government intended to construct." 955 F. Supp. at 1252. "Through the public highways clause, the Yakamas preserved not only their aboriginal right to continue traveling off-reservation ... but a continuing right to do so on public highways if and when they should be built." *Id.* at 1253. Thus, the Treaty secures the Yakamas' pre-existing freedom from taxation when traveling across former Yakama territory—even if that travel takes place via subsequently-built highways rather than via Indian trails.

Third, therefore, the Treaty preempts the tax. When Respondent transports fuel to the Yakama Reservation, it "exercis[es] the very right their ancestors intended to reserve." *Tulee*, 315 U.S. at 685. In 1854, when the Yakamas exercised their right to transport goods to market, they would have incurred no tax obligations. Indeed, with respect to travel in Yakama territory, they would have been *immune* from such obligations. The Treaty therefore secures Respondent's right to bring goods to market without incurring a tax obligation.

B. The Treaty is naturally understood to treat taxation of off-reservation travel in parallel with taxation of on-reservation activity.

This analysis is consistent with the most natural reading of the right-to-travel provision: as a provision ensuring that the Yakamas may transport goods to and from market off the reservation without losing the tax immunity they possess for on-reservation activity.

It is undisputed that if the Yakamas' reservation boundary reached the Washington/Oregon state line, the State could not impose its tax, because all of Respondent's in-state conduct would take place on the reservation. But there is a gap between the state line and the reservation entrance, which Respondent's trucks must travel across to reach the reservation. The State seeks to exploit Respondent's travel across that gap in order to impose its tax.

Respondent's position prevents the State from doing so. It ensures that Respondent's travel between the state line and the reservation entrance is treated, for tax purposes, as though that travel occurred on the reservation itself.

This position is consistent with a natural reading of the Treaty. The Treaty secures two types of rights relevant here. First, it secures a reservation. Second, it secures the right to travel to and from the reservation via public highways: it secures "the right of way, with free access from the [reservation] to the nearest public highway," as well as the "right ... to travel upon all public highways."

The State's position is that when the Yakamas exercise their on-reservation property rights, they are tax immune, but when they exercise their right to travel to and from the reservation, they may be taxed. There is no textual basis whatsoever in the Treaty for this position. To be sure, under the Treaty, the Yakamas' right to use the reservation is exclusive, while their right to use the highway is not. But by "secur[ing]" the off-reservation right to travel, the Treaty leaves intact certain rights the Yakamas enjoyed when they *did* possess that off-reservation land—including freedom to travel tax-free.

The Treaty's history confirms the two types of rights should be treated in parallel. Governor Stevens promised the Yakamas not only a reservation, but the "same libert[y] outside the reservation" as within it "to go on the roads to market." *Yakama Indian Nation*, 955 F. Supp. at 1244. The natural inference from this promise is that, just as the Yakamas enjoyed the liberty to use on-reservation roads tax-free, they would enjoy the "same libert[y] outside the reservation." *Id.*

At a minimum, the Yakamas would reasonably have understood the Treaty to operate that way. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (courts must give "effect to the terms" of a treaty "as the Indians themselves would have understood them" (quotation marks omitted)). Before the Treaty, the Yakamas *already* traveled extensively. *Yakama Indian Nation*, 955 F. Supp. at 1252. By ceding land they previously occupied, the Yakamas relinquished their right to exclude non-Indians from traveling across that land. But with respect to the

Yakamas' *own* travel, it is perfectly reasonable to understand a treaty "securing the right to travel" as permitting the Yakamas to continue traveling as before—*i.e.*, tax-free.

The State offers no historical argument that the Yakamas would have understood the Treaty to create different tax rules for on-reservation activity and off-reservation travel. Instead, it relies entirely on quotations from this Court's cases distinguishing a State's power to tax on- and off-reservation. Pet. Br. 18-21. But in those cases, the treaties at issue did not protect any relevant off-reservation activity, so the States had the authority to tax off-reservation activity. The Yakamas negotiated a different deal. Unlike other Tribes, the Yakamas secured an off-reservation right—the right to travel along the highways. As *Tulee* shows, off-reservation treaty rights preempt off-reservation taxes. Cases about the State's power over off-reservation activity that involve treaties that confer no off-reservation rights are irrelevant to the scope of the State's power over off-reservation activity that is expressly protected by a treaty.

C. Taxes on activities not protected by the Treaty are not preempted.

It is important to emphasize the limits of Respondent's position. Respondent does not suggest that any activity by a Yakama with any connection to a highway cannot be taxed. The Treaty protects the right to travel. If a Yakama is exercising that right, the Treaty preempts the tax. But if the Yakama engages in any off-reservation activities distinct from

the exercise of the right to travel, those activities may be taxed.

Here, the Treaty preempts the tax because Respondent's sole in-state, off-reservation act consists of transporting fuel on the highway to market, which is treaty-protected activity. The State claims it is taxing Respondent's possession, rather than transportation, of fuel. But even if this were true, *but see infra* Part III, it would not be a defense to preemption. Possession is inherent in transportation. It is impossible to transport something without possessing it. Therefore, if Respondent may transport goods without incurring a tax obligation, Respondent necessarily may undertake the constituent acts making up that transportation—including possession of goods while transporting them—without incurring a tax obligation.

By contrast, the right-to-travel provision would not preempt taxation of acts *distinct* from the exercise of treaty rights, such as off-reservation economic transactions occurring before or after the highway travel. Similarly, the State could tax an act that occurred *during* off-reservation highway travel, so long as that act is distinct from the highway travel itself. Suppose, for instance, a Yakama purchased an item from Amazon while a passenger in a moving car. The State could impose its sales tax; the Yakama could not claim an exemption merely because he was on the highway when he made the purchase. This is because the purchase of the item is not inherently part of treaty-protected activity, and so is distinct from the exercise of the treaty right to travel.

D. Whether the tax is "on" possession or "on" transportation is irrelevant to preemption.

The State's core defense to preemption is that the tax is really a tax on the *possession* of fuel rather than the *transportation* of fuel. The State points out that some "possessors" do not transport goods: In-state refineries must pay the tax when they fill trucks with fuel at the refinery. Thus, in its view, the tax is best viewed as a tax on possession. Pet. Br. 27; *see* U.S. Br. 22.

Even if the tax were *expressly* a tax on possession, *but see infra* Part III, it would be preempted. What matters is whether the basis for the State's taxation of *Respondent* is treaty-protected activity. Here, Respondent's possession of fuel cannot be disaggregated from Respondent's treaty-protected transportation of that fuel, so it cannot be taxed. It is irrelevant whether the State *also* chooses to tax other individuals' possession without transport, such that the statute can be described as a general possession tax.

The State's approach to preemption is fundamentally different. According to the State, the tax is not preempted because it also applies to other entities, such as refineries, who do not transport fuel on highways. The State's argument implies that if it did *not* tax in-state refineries at the point of sale, but instead *only* taxed importation, the tax would be an impermissible tax on transportation. But because the tax applies to both, the State contends the tax is no longer a tax on transportation and is thus authorized—even as applied to Respondent's importation.

The State's approach is inconsistent with the right guaranteed by the Treaty. The Treaty protects the *tribal members'* "right to travel." The burden on that right is identical regardless of whether the statute taxes in-state refineries who do not transport fuel. Hence, whether the State separately taxes such refineries should be irrelevant to the preemption analysis.

The State's argument is also inconsistent with this Court's understanding of the right-to-fish provision. This Court has held that the right-to-fish provision provides a permanent easement to enter private property to fish at "usual and accustomed places," and thus preempts state trespass laws that would prevent the Yakamas from entering that property. *See Seufert Bros. Co. v. United States*, 249 U.S. 194, 199 (1919); *Winans*, 198 U.S. at 380, 384. The state trespass laws were not "on" fishing; they applied to anyone entering the property, regardless of whether they intended to fish. But because it is impossible to fish at a "usual and accustomed place" without entering that place, the Court held that—as applied to Yakamas exercising their treaty-protected rights—the law was preempted, regardless of whether the law applied to others not exercising the right.

The same analysis applies here. The tax is preempted because the sole thing Respondent is doing off the reservation is treaty-protected activity: transporting goods to market via public highways. Whether the tax applies to other entities not engaging in that activity is irrelevant.

Indeed, the canon that "Indian treaties are to be liberally interpreted in favor of the Indians, and ... any ambiguities are to be resolved in their favor," *Mille Lacs*, 526 U.S. at 200 (citations omitted), makes this an open-and-shut case in Respondent's favor. The Treaty protects the "right to travel." Respondent's position is that if it is exercising that right and doing nothing else, it cannot be taxed. *Even if* the Treaty were ambiguous, Respondent's interpretation is *at least* a plausible one. The Treaty does not *unambiguously* support the State's theory that a tax burdening the Yakamas' exercise of their right to travel is permissible as long as it also applies to other entities who do not travel.

III. EVEN IF PREEMPTION TURNED ON WHAT THE TAX WAS "ON," WASHINGTON'S TAX WOULD BE "ON" IMPORTATION.

As explained above, it is irrelevant whether the State's tax is "on" first possession or "on" transportation. But even if this were relevant, Respondent would still prevail because the tax is "on" importation—*i.e.*, transportation—of fuel.

A. The tax is preempted because it is expressly triggered by importation.

Tulee and *Yakama Indian Nation* establish that, at a minimum, a tax *expressly* triggered by the exercise of treaty-protected activity is preempted. The fee in *Tulee* was triggered by fishing; the fee in *Yakama Indian Nation* was triggered by highway use; and both courts found this was sufficient to establish preemption.

Here, the Treaty is triggered by transportation of goods. By the statute's express terms, the *importation* of fuel triggers the tax. To "import" goods means to transport them. Thus, the very *thing* that triggers the tax is the exercise of treaty-protected rights. Confirming the point, the state supreme court held that the statute "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. Because the statute states that it is "on" treaty-protected activity, it is preempted as applied to a Yakama engaging in that activity.

The State contends that its statute is triggered by *off-reservation possession*, not *off-reservation transportation*—and the mere fact that the possession *happens* to be on the highway does not make Washington's statute a tax on highway use. Pet. Br. 27. The United States similarly characterizes the highway as merely the "setting for undertaking an act ... that is subject to a general regulation or financial assessment, wherever the act takes place." U.S. Br. 20. To the United States, Respondent's position is equivalent to a person claiming an exemption from a tax on possession of penknives merely because he happens to be possessing them while driving his car. *Id.*

That contention is incorrect. Respondent's travel is *not* incidental to the imposition of the tax; it is essential. Because the statute explicitly applies to "import[ation]," the State must *prove* that Respondent imported goods to apply its tax. Unlike in the penknife hypothetical, the State would be *incapable* of imposing its tax on Respondent unless it proved that Respondent imported the goods—not just possessed them.

The State's and United States' position boils down to a disagreement with the state supreme court's interpretation of state law. Below, the dissent agreed with the State that "'import,' as used here, is a term of art not requiring transportation of any kind." Pet. App. 18a. Thus, the dissent maintained that the tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to Washington." Pet. App. 28a. The United States quotes this language twice. U.S. Br. 19, 31. But the majority rejected this interpretation, finding that the State statute "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. The incidence of a tax is a question of state law, *see Oklahoma*, 515 U.S. at 461, and this Court is "bound by a [state supreme court's] interpretation of state law," *Johnson v. United States*, 559 U.S. 133, 138 (2010).

The State hypothesizes that the statute could be rewritten as a tax on "first possession," and suggests that such a hypothetical statute would not be triggered by transportation. But that is not the statute the State enacted. The statute the state *has* enacted does not actually tax all instances of "first possession." For instance, it distinguishes between "first possessors" depending on their method of transportation. *Supra*, at 7-8. Moreover, if the "first possessor" transports the fuel out of state, it is exempt from the tax. Wash. Rev. Code § 82.38.030(9)(b)(ii).

But even a hypothetical statute applicable to "first possessors" would be preempted. A tax on "first possession" is not actually a tax on possession. A true tax on possessing something applies to anyone who

possesses that thing—whether he possesses it "first" or not. The classic example is a real estate property tax, levied annually on all possessors of real estate. By contrast, a tax on "first possession" means that some possessors are taxed but not others. Thus, the tax is not directed to possession qua possession.

To the contrary, the "first possessor" will invariably be either the refinery (for fuel refined in-state) or the importer (for fuel refined out of state). Thus, for anyone other than a refinery, a tax on "first possession" of fuel is inherently a tax on importation. So the "first possessor" tax would be preempted, even if it does not use the word "import."

But the Court should not even consider this hypothetical statute. The statute states it is triggered by "importfation]," and the state supreme court construed it as such. That suffices to resolve this case.

B. Preemption turns on the trigger for the tax, not its holistic operation.

The State and the United States argue that determining what a tax is "on" requires a holistic view. They argue that when considering what the tax is "on," the Court should analyze the statute's overall operation, rather than focusing on the precise activity by the taxpayer that triggers application of the tax. They observe that in-state refineries are liable for tax when the fuel enters the stream of commerce. Therefore, they maintain that the tax should be viewed as effectively taxing "each gallon of fuel entering the state stream of commerce, irrespective of whether and

how it is transported into the State." U.S. Br. 19; *see also* Pet. Br. 27-28.

This contention is foreclosed by *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). *Wagnon* concerned a Kansas statute enacted in the wake of *Oklahoma*'s holding that States may not tax on-reservation sales of fuel. The Kansas statute instead imposed the tax "on the distributor of the first receipt of the motor fuel"—which occurred off the reservation. *Id.* at 102 (quotation marks and citation omitted). As the dissent pointed out, the statute contained several tax exclusions such that "[w]hen all the exclusions are netted out, the Kansas tax is imposed not on all the distributor's receipts, but effectively *only* on fuel actually *resold* by the distributor to an in-state nonexempt purchaser." *Id.* at 119 (Ginsburg, J., dissenting). The dissent argued that if one viewed the statute holistically (in light of the exclusions), the statute effectively taxed only the fuel sold to in-state retailers—which meant that under *Oklahoma*, the tax was preempted as applied to on-reservation retailers.

The majority disagreed and upheld the tax. It distinguished *Oklahoma* on the ground that what "triggers tax liability [in Kansas] is the sale or delivery of the fuel to the distributor," off the reservation. *Id.* at 107 (majority opinion). Emphasizing the importance of "geographic sovereignty concerns" and "bright-line standards" in Indian tax administration cases, *id.* at 113 (quotation marks omitted), the Court adopted a straightforward rule: Preemption turns on what activity by the taxpayer triggers the tax, rather than

what, viewed holistically, the statute might be said to effectively tax.

Wagnon is significant to this case because the "Washington tax ... operates in the same way as the Kansas tax upheld by this Court in *Wagnon*." U.S. Br. 21. Indeed, the Washington tax was enacted after a prior tax regime, which placed the incidence of the tax on the retailer, was held to be preempted under *Oklahoma*. *See Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005); U.S. Br. 21-22.[4]

Wagnon's "trigger" rule is the State's basis for applying its tax to fuel headed to every other reservation in Washington. Because the tax is triggered when the importer transports the fuel across the state line, not when the importer reaches the reservation and sells the fuel, the tax's incidence occurs outside the reservation. And, for every other tribe, no treaty provision precludes the State from levying a tax triggered by off-reservation transportation.

But under *Wagnon*'s "trigger" rule, the Yakamas prevail. Unlike every other Washington tribe, the Yakamas negotiated a right-to-travel provision. Thus, the trigger for the tax—off-reservation transportation of goods to the reservation—is a protected right under the Yakama Treaty.

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[4] The Washington Supreme Court has noted that it remains undecided whether the new tax actually did "move[] the legal incidence of the fuel tax away from the tribal retailers." *Auto. United Trades Org. v. State*, 357 P.3d 615, 622 (Wash. 2015). However, Respondent has not argued otherwise in this case.

To avoid this result, the State and the United States ask the Court *not* to decide preemption based on the taxpayer's activity that formally triggers the tax. Instead, they ask the Court to take account of the tax's holistic operation and conceptualize it as a tax on fuel entering the stream of commerce. That is virtually identical to the approach this Court rejected in *Wagnon*.

The Court should again reject this approach. The Court should apply the law neutrally: If the formal "trigger" analysis is applied when it favors the State, it should also be applied when it favors a tribe.

C. The State's and United States' explanation of what the tax is "on" is arbitrary.

The position of the State and the United States has a more fundamental flaw. Their core intuition is that "the Washington Legislature was targeting first possession, rather than the use of the highways." U.S. Br. 11; *see also* Pet. Br. 27. But in addition to conflicting with the state court's interpretation of state law, that description is arbitrarily narrow. Even if it were true that the Legislature intended to tax fuel at the moment it enters the stream of commerce, it is simultaneously true that the Legislature's intent can be framed in three additional ways, each of which show that the Legislature *was* targeting protected activity:

- As previously noted, the State enacted its statute in response to *Squaxin*, which held that the incidence of Washington's tax could not fall on in-reservation transactions. The

statute was specifically constructed to exploit the fact that fuel does not originate on Indian reservations, but has to be transported there. As applied to imported fuel, the point of the statute was to ensure the tax's incidence would be outside the reservation—*i.e.*, while the fuel was transported. Thus, the Legislature's "target" was ensuring that the incidence of the tax would be on off-reservation transportation.

- Moreover, like the statute in *Wagnon*, the statute's purpose was to impose an excise tax on all fuel sold at retail in the State—including fuel sold on Indian reservations. Thus, the Legislature's "target" was to subject fuel headed to Indian reservations to an excise tax.

- Finally, under Washington law, fuel tax revenues do *not* go into the State's general coffers, but go exclusively to finance road maintenance, Wash. Const. amend. 18—exactly like highway tolls. Thus, the Legislature's "target" was to bring in revenue that could be used to maintain roads—the exact purpose of a highway toll.

There is no judicially administrable way of selecting among these "targets." Particularly in tax administration, where predictability is so important, preemption should not turn on the holistic question of what the statute's "target" was. Instead, the question should be: What triggers the tax? In this case, the state supreme court authoritatively held that

transportation triggers the tax, which should be the end of the matter.

D. It is irrelevant that the statute does not explicitly mention highways.

The State and United States additionally argue that even if Washington's tax is triggered by *transportation*, it is not triggered by transportation *on the public highways*. They claim that *any* method of importation—not just via highway—triggers the tax. Thus, the fact that Respondent happens to use the highway is an incidental choice, akin to the incidental choice to purchase an item from Amazon while in a moving car. That argument is wrong.

It does not appear to be possible for importation to trigger tax liability without using the highway. The State asserts that it is possible to import fuel via "pipeline" or "barge." Pet. Br. 25. But the tax does not apply to importation of fuel via a "pipeline or vessel" that is bound for a "terminal" or "refinery." *Supra*, at 7 (explaining statute's operation). In that scenario, the tax is imposed only when the fuel is offloaded from the terminal or refinery. *Id.* Under the statute, the "motor vehicle fuel importers" who pay the tax are those who import via "a railcar, trailer, truck, or other equipment suitable for ground transportation." *Id.* Other than unusual situations involving unlicensed entities (*see supra* note 3), it is unclear whether there are *any* scenarios where importation triggers the tax but the fuel was not imported on the highway. Thus, the

statute would work virtually *identically* if the words "on the highway" were added after "importation."[5]

Even if it were possible for the tax to apply to importation via other means, this would be irrelevant. The Treaty protects the Yakamas' right to travel on the highway. Thus, preemption should turn on whether the tax burdens Respondent's use of the highway. Whether the tax could hypothetically be imposed on a barge does not lessen the tax burden on Respondent.

Indeed, the State's theory leads to absurd results. Under the State's theory, a physical blockade on all methods of transportation to and from the reservation would not violate the Treaty, because a burden on transportation *generally*—including both via highway and via airplanes—is not "on" highway use. Or more realistically, if the fee at issue in *Yakama Indian Nation* was a transportation fee rather than a highway fee—and thus also applied to use of airplanes—the

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[5] The State points out that fuel can be imported on railroads. Pet. Br. 25. But it is likely that "highway" travel, under the Treaty, encompasses railroad travel. Today, "highway" is understood to mean asphalt roads on which automobiles travel. That was not true in 1855, when automobiles did not exist. The Treaty negotiations provide evidence that "highway" travel includes railroad travel. The government's negotiator told the Yakamas: "My brother has stated that you will be permitted to travel the roads outside the reservation. We have some kind of roads which perhaps you have never seen.... That kind of road we call a rail road.... Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country ...." *Yakama Indian Nation*, 955 F. Supp. at 1244. Thus, the off-reservation right to travel on "highways" encompasses railroad travel.

State would say that the fee does not violate the treaty. But that cannot be right. The Treaty protects the "right to travel" on the highway. The burden on the Tribe's right to travel on the highway is not lessened by the existence of an airplane tax.

The State's logic is also inconsistent with *Tulee*. The fee in *Tulee* applied to *any* type of fishing, and not only to fishing at "usual and accustomed places"—*i.e.*, the Treaty-protected right. Thus, under the State's theory, because the fee applied both to Treaty-protected and non-Treaty-protected fishing, the fee would not be preempted. Yet the Court held that when a Yakama exercised his right to fish at "usual and accustomed places," the fee was preempted.

Similar reasoning should apply here. If the State taxes both Treaty-protected and non-Treaty-protected transportation, and a Yakama exercises his right to transport on the highway, then the tax is preempted.

Moreover, the Court should consider the perspective of the Yakamas in 1855. At that point, the only way out of the reservation was by roads. Airplanes and pipelines did not exist. The State suggests that by aggregating a burden on highway travel with a burden on other methods of transportation that did not exist in 1855, the State can show it does not burden travel on the highway, and therefore does not violate the Treaty. It is unlikely that the Yakamas would have understood the "right to travel" this way, to put it mildly.

Finally, the Court should take a practical view. In the real world, Respondent's choice to use the highway

is not an incidental choice, akin to the choice to buy an Amazon product in a moving car. As the court below observed, "it was impossible for Cougar Den to import fuel without using the highway." Pet. App. 14a. There is no other means for fuel to reach the reservation. Contra the State, the court was not enacting a general test under which preemption turned on an empirical analysis of the relative practicability of various methods of transport. Pet. Br. 25-26. It was merely expressing the intuition that a tax on transport, when it is physically impossible to transport by any means other than the highway, is a tax on highway transport.

IV. NO CASE LAW SUPPORTS THE STATE'S POSITION.

The State does not grapple with the authorities most pertinent to this case. Most notably, it does not cite *Tulee*—a case interpreting similar language in the same article of the same treaty as this case—anywhere in its brief. Instead, it relies on case law purportedly establishing that preemption of a tax requires a "clear statement," as well as case law upholding other off-reservation state taxes. No such "clear statement" rule exists, and the case law upholding other off-reservation state taxes is irrelevant here.

A. There is no clear-statement rule.

The State contends that a treaty cannot preempt a state tax unless such preemption is "clearly expressed" and "unambiguously proved." Pet. Br. 16. The State does not dispute that the Treaty "clearly express[es]" and "unambiguously prove[s]" that the Yakamas have off-reservation *rights*: It preserves the right to travel

on "all public highways," including highways off the reservation. But the State maintains that the Treaty cannot preempt a tax unless it "clearly" and "unambiguously" refers to *taxes*—and because the Yakama Treaty "says nothing whatsoever about preempting taxes," *id.* at 24, there can be no preemption. The State's proposed clear-statement rule is wrong, for several reasons.

1. The State's theory conflicts with *Tulee* and *Yakama Indian Nation*. *Tulee* held that the Treaty's right-to-fish provision preempts generally applicable taxes, while *Yakama Indian Nation* reached the same conclusion with regard to the right-to-travel provision. Yet neither provision explicitly refers to taxes. If the State's clear-statement rule existed, both cases would have been decided the opposite way.

Indeed, *Tulee*, *Puyallup*, and *Yakama Indian Nation* establish that under the Treaty's right-to-fish and right-to-travel provisions, taxes *are* preempted while certain regulatory provisions are not. *Supra* Part I.B.4. The State's proposed rule—that taxes, but not other laws, require a "clear statement" for preemption—is the precise opposite of that rule.

2. The State's proposed rule has no principled basis. The State's position would assume that a Treaty provision *securing* a preexisting right nonetheless *relinquishes* any associated tax immunity unless it expressly uses the word "tax." The State's proposed rule is not a textualist rule: The whole point of clear-statement rules is to deviate from standard textualist interpretative principles. Nor can it be justified based on the intent of the contracting parties: The State

offers no basis for believing that either the Tribes, or the United States, could possibly have anticipated this rule. A rule of construction that hews *neither* to the text *nor* to the parties' expectations has little to recommend it.

3. The State's proposed rule conflicts with two well-established canons of construction in Indian treaty cases. First, courts must give "effect to the terms" of a treaty "as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196; *Tulee*, 315 U.S. at 684 (Court's "responsibility" is to interpret Yakama Treaty "so far as possible, in accordance with the meaning they were understood to have by the tribal representatives"). Yet, according to the State, unless a treaty refers explicitly to a "tax," it cannot preempt a tax, *even if* all agree that the Indians understood the Treaty's terms to prevent taxation while exercising certain rights.

Second, "Indian treaties are to be liberally interpreted in favor of the Indians, and ... any ambiguities are to be resolved in their favor." *Mille Lacs*, 526 U.S. at 200 (citations omitted); *Tulee*, 315 U.S. at 685 (Yakama Treaty to be interpreted "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people"). Under the State's proposed clear-statement rule, however, ambiguities over whether treaties preempt taxes must be resolved in the State's favor, in contradiction of that canon.

4. The State's clear-statement theory is also irreconcilable with a core premise of Indian law jurisprudence: that a State is generally "without power

to tax reservation lands and reservation Indians." *City of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992). If the State's theory were correct, then this Court would have held that States do have taxing authority in Indian country.

Treaty provisions creating Indian reservations typically say nothing about taxes: Article II of the Yakama Treaty, for instance, merely states that the reservation will be "for the exclusive use and benefit of" the Tribe. Yet in *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164 (1973), this Court held that such reservation-creating provisions implicitly bar a state from taxing reservation lands. *McClanahan* held that Arizona's state income tax, as applied to Navajos earning their income on the Navajo reservation, was preempted by the 1868 treaty between the United States and the Navajo Nation. Like the Yakama Treaty, the Navajo Treaty "nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes"; rather, it merely creates, and gives the Navajos authority over, the Navajo reservation. *Id.* at 174. Nevertheless, the Court held that the tax could not be imposed, citing the "general rule" that "in interpreting Indian treaties ... [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *Id.* That reasoning cannot be reconciled with the State's express-statement rule, which would have necessitated ruling in Arizona's favor.

Indeed, *McClanahan* suggests that the presumption should go the other way. In *McClanahan*,

the Court emphasized that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive," and that exclusive authority "plainly extended" to preclude "state taxation within the reservation." *Id.* at 168-69 (quoting *Worcester*, 31 U.S. (6 Pet.) at 557). While acknowledging that "modern cases" look "to the applicable treaties and statutes which define the limits of state power," *id.* at 171-72, the Court stated that the "Indian sovereignty doctrine" and its concomitant tax immunity nevertheless provide "a backdrop against which the applicable treaties and federal statutes must be read," *id.* at 172. Thus, *McClanahan* suggests that when a Treaty preserves a right, it also *preserves* the background tax immunity associated with the exercise of that right, unless the treaty expressly states otherwise.

5. The State's authorities do not support the application of a clear-statement canon. The State relies on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Chickasaw Nation v. United States*, 534 U.S. 84 (2001); and *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870). Pet. Br. 20-21. But all of those cases apply a different canon: that in interpreting federal *statutes* that confer tax exemptions, the exemptions are to be construed narrowly. Statutes differ from treaties in an important respect: unlike treaties, statutes are not agreements with tribes. A typical statute that Congress unilaterally passes does not need Tribes' consent. But a treaty that could only become enforceable with the Tribe's consent must be interpreted in light of the intent of the signing party,

the Tribe. Thus, when interpreting treaties, the intent of the Tribes matters; when interpreting statutes, it does not. Principles applicable to the latter cannot be blindly imported to the former.

Moreover, in *Chickasaw Nation*, the Court did not hold that the narrow-construction canon for tax exemptions must inevitably prevail over pro-Indian canons. *Chickasaw Nation* did not involve any question of treaty interpretation. Rather, it considered whether a Tribe should be exempt from a generally applicable federal tax. The Tribe invoked the "canon that assumes Congress intends its statutes to benefit the tribes." *Chickasaw Nation*, 534 U.S. at 95. The Court stated that one cannot "say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue." *Id.* It then observed that the "Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength." *Id.* In this case, Respondent merely seeks an individualized assessment of the legal circumstances, as opposed to the unthinking application of a supposed rule that the absence of the word "tax" in a treaty is dispositive.

6. *Cherokee Tobacco* and *Chickasaw Nation* are also distinguishable from this case for a different reason: In those two cases, the Tribes sought exemptions from *federal* taxes. A Tribe claiming an exemption from a *federal* tax—even a treaty-based exemption—is on weaker footing than a Tribe claiming an exemption from a *state* tax. This is because federal statutes can

abrogate treaties, but state statutes cannot. Thus, when a Tribe claims that a treaty overrides a subsequently enacted federal tax statute, the Tribe is really asking the Court not to read the subsequently enacted federal statute literally.[6]

Cherokee Tobacco and *Chickasaw Nation* reflect the unremarkable principle that federal statutes should be read literally. In *Cherokee Tobacco*, the Court held that the federal tax statute did violate the relevant treaty, but the Court was constrained to construe the subsequently enacted federal statute according to its terms: "Undoubtedly one or the other must yield," but because "an act of Congress may supersede a prior treaty, ... the act of Congress must prevail as if the treaty were not an element to be considered." 78 U.S. at 620-21. In *Chickasaw Nation*, which involved no treaty, the Court declined to read an atextual exemption into a generally applicable federal tax statute: "The language of the statute is too strong to bend as the Tribes would wish." 534 U.S. at 89.

In contrast, where, as here, a Tribe claims that a treaty overrides a subsequently enacted state tax, the Tribe does not ask the Court to bend the language of a state statute. Rather, it merely argues that the treaty preempts it.

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[6] To be sure, this Court has stated that federal statutes will not be construed to abrogate Indian Treaties unless there is "clear evidence" that Congress intended to do so. *United States v. Dion*, 476 U.S. 734, 739-40 (1986). But when a federal statute makes clear that a treaty is abrogated, the treaty must yield. By contrast, when a state statute is inconsistent with a treaty, the treaty prevails.

That explains how the Ninth Circuit could, in *Yakama Indian Nation*, declare that state highway taxes are preempted, and then, shortly thereafter, reject Mr. Ramsey's claim that he is also exempt from federal highway taxes. The Ninth Circuit explained: "[*Yakama Indian Nation*'s] analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation." *Ramsey v. United States*, 302 F.3d 1074, 1078 (9th Cir. 2002). "The federal government has plenary and exclusive power to deal with tribes," whereas "[a] state's regulatory authority over tribal members is limited by the tribal right of self-government and the preemptive effect of federal law." *Id.* Whether a treaty exempts tribal members from a subsequently enacted federal statute is thus a question distinct from (and irrelevant to) the question whether that treaty exempts tribal members from a subsequently enacted state statute.

B. *Mescalero* and *Oklahoma* do not assist the State.

The State also contends that two cases specifically support its right to levy its tax: *Mescalero* and *Oklahoma*. Pet. Br. 22-24. Neither case assists the State.

Mescalero was not a treaty-interpretation case. Rather, *Mescalero* concerned a federal statute providing that "lands or rights" taken in trust for Tribes "shall be exempt from State and local taxation." 411 U.S. at 155. The Court construed the statute literally, declining to extend the exemption to income derived from use of the land. *See id.* at 156-57. *Mescalero*'s holding is not a surprise. Federal tax

statutes are enacted with precision. If Congress limits a tax exemption to property taxes, courts should take Congress at its word.

This case does not concern the scope of a statutory tax exemption. It concerns an Indian treaty which protects the right to travel. To determine the scope of that treaty, courts must look to the preexisting legal regime, coupled with the Indians' understanding of the treaty. This analysis of the legal backdrop from 1866 was absent from, and irrelevant to, the garden-variety statutory interpretation analysis in Mescalero.

Oklahoma was a treaty-interpretation case—but its rationale favors Respondent. The State relies on the portion of *Oklahoma* in which the Court held that the Treaty of Dancing Rabbit Creek did not preempt Oklahoma from levying its income tax on Indians who resided off the reservation. The pertinent portion of that Treaty specified that no State "shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants." 515 U.S. at 466.

Under the State's proposed clear-statement canon, the Court should have resolved *Oklahoma* on the ground that the Treaty did not specifically refer to "tax." But the Court did not even mention that canon. Instead, it ruled for the State on the ground that the Tribe's claim "founders on a clear geographic limit in the Treaty." *Id.* at 466. "By its terms," the Court reasoned, "the Treaty applies only to persons and property 'within the [Nation's] limits.'" *Id.* Thus, the Treaty "provide[s] for the Tribe's sovereignty within Indian country," but does not interfere with

Oklahoma's "sovereign right to tax income" of those who "choose to live" outside Indian country. *Id.*

Unlike the Chickasaws, the Yakamas negotiated a treaty right that expressly applies outside the reservation. The Court's reasoning therefore does not apply. More generally, *Oklahoma* demonstrates that the sharp distinction this Court ordinarily draws between taxation of on-reservation and off-reservation activity stems from the underlying treaties at issue, which themselves draw that distinction. That analysis cannot be imported to a context where the treaty applies, by its terms, outside the reservation.

V. THE STATE'S PRACTICAL CONCERNS ARE UNWARRANTED.

Contrary to the State's concerns, Respondent's position will not jeopardize Washington's fuel-tax regime or any other tax.

A. Respondent's position will not "decimat[e]" the State's fuel-tax regime.

The State expresses concern that ruling for Respondent would "decimat[e]" the State's fuel-tax regime. Pet. Br. 40. That is incorrect.

As a threshold matter, the sole practical issue here is whether the State can collect tax for a Yakama distributor's transportation of fuel from out of state to the Yakama Reservation. No other Washington Tribe has a treaty with a right-to-travel provision. And with respect to the Yakamas' transportation of fuel for sale

to off-reservation retailers, the State is free to tax the sale, just as it did prior to the enactment of its statute.

With respect to fuel that Respondent transports to the Yakama Reservation, the State has a legitimate policy concern that non-Indians will come on the reservation, buy fuel to avoid taxes, and then drive their cars on off-reservation state roads. But *Oklahoma* offered the solution: "[D]eclar[e] the tax to fall on the consumer and direct[] the Tribe to collect and remit the levy." 515 U.S. at 460. This is how cigarette taxes work on Indian reservations: To prevent Tribes from "market[ing] an exemption from state taxation," Tribes must collect cigarette sales tax from non-Indian purchasers. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980). The State could have similarly imposed its fuel tax on consumers.

Realistically, the State rejected *Oklahoma*'s solution because it is politically unpopular: consumers do not like paying taxes. The State prefers to levy the tax earlier in the supply chain, so consumers can blame the gas station rather than the State for high prices. This decision has consequences: When the tax is triggered by Yakamas engaged in treaty-protected activity, it is preempted.

B. Respondent's position will not affect the collection of cigarette and other taxes.

The State and its amici also claim that Respondent's position would radically affect the State's ability to collect other taxes, most notably cigarette taxes. Their

concern is that if Respondent prevails, the Yakamas will claim an exemption from taxes associated with any goods that merely *were* transported on the highway. That is wrong. Under established precedent, the State is free to tax the off-reservation purchase or sale of goods, regardless of whether they were transported on the highway.

King Mountain Tobacco Co. v. McKenna, 768 F.3d 989 (9th Cir. 2014), illustrates this point. There, the tobacco company, King Mountain, sold cigarettes not only on the reservation, but "throughout Washington and in about sixteen other states." *Id.* at 991. The state tax at issue required tobacco companies to "place money into escrow to reimburse the State for health care costs related to the use of tobacco products." *Id.* at 990. "The amount placed in escrow is based on the number of cigarette sales made that are subject to state cigarette taxes"—*i.e.*, off-reservation transactions. *Id.* at 990-91. King Mountain argued that the Yakama Treaty preempted the tax, because even though the tax was not *triggered* by transportation, the cigarettes that were sold *in fact were* transported on the highway. *Id.* at 997. The Ninth Circuit disagreed and upheld the tax. *Id.* at 998.

The State claims that under Respondent's position, King Mountain would have prevailed. Pet. Br. 32-34. The State is wrong: *Wagnon* establishes that the Ninth Circuit's decision is correct. Indeed, the tribal member's unsuccessful argument in *King Mountain* was structurally identical to the unsuccessful argument in *Wagnon*. In *Wagnon*, the Tribe's theory was that the fuel at issue *would be* sold on the reservation; in

King Mountain, the Tribe's theory was that the cigarettes at issue *had been* transported on the highway. In *Wagnon*, the Tribe lost because the tax was not *triggered* by the on-reservation sale; in *King Mountain*, the Tribal member lost because the tax was not *triggered* by transportation, but rather, was triggered by cigarette *sales* that were subject to tax.

This analysis resolves all the practical concerns identified by the State and its amici. The State expresses concern that Respondent could evade taxes with respect to anything that merely *was* transported on the highway. Its greatest concern is that Respondent will be able to import cigarettes on the highway and sell them statewide, while avoiding cigarette taxes on the ground that the cigarettes were transported on the highway. Pet. Br. 41-43. This is a red herring. Washington's excise tax is imposed on the "sale, use, consumption, handling, possession or distribution" of cigarettes, Wash. Rev. Code § 82.24.020 (2018), all of which may be taxable events even if the cigarettes were transported on the highway. For wholesalers, "handl[ing] for sale any tobacco products that are within this state but upon which tax has not been imposed" is defined as a taxable event. Wash. Rev. Code § 82.26.020(2) (2018). Any time a Yakama wholesaler sells cigarettes to an off-reservation retailer, it would be liable for excise tax under this provision, regardless of whether the cigarettes were transported on the highway.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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No. 16-1498

In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

PETITIONER,

v.

COUGAR DEN, INC., A YAKAMA NATION CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Washington's fuel tax does not violate the Yakama Nation's "right, in common with citizens of the United States, to travel upon all public highways." It applies off reservation per gallon of fuel possessed "regardless of whether Cougar Den uses the highway." Pet. App. 13a. Cougar Den would owe exactly the same tax if it transported fuel by private toll road, barge, or pipeline.

Cougar Den seeks to obscure this simple conclusion in two ways. Both fail.

First, Cougar Den claims that the Treaty creates a right much broader than what it says. Citing *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), and this Court's decisions interpreting different treaty language, the company argues that the highway-travel clause implicitly creates a right to transport goods *without taxation of those goods*. But until the courts below, no court had ever reached that conclusion, which finds no support in precedent or the Treaty's text or history.

Second, Cougar Den portrays Washington's fuel tax as a tax on travel by mischaracterizing state law. But Cougar Den cannot show that its tax burden turned in any way on use of public highways. Pet. App. 13a. This is not a tax on highway travel and thus is not a tax on the "very right" reserved in the Treaty. *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

This Court should reverse.

ARGUMENT

A. The Yakama Treaty Creates No Right to Transport Goods Without Taxation of Those Goods

Unable to prevail under the Yakama Treaty's language, Cougar Den first asks the Court to skip past that language. The company claims that decisions interpreting another treaty clause and legal conclusions in a district court decision create an implied right to transport goods without taxation of those goods. Cougar Den's approach ignores longstanding rules of Indian law, and the authorities it cites cannot bear the weight it claims.

1. Longstanding rules of Indian law control here and forbid adding unwritten rights to treaties

"[T]he starting point" for determining if an Indian treaty creates a particular right "is the treaty language itself." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999).[1] The language is "interpreted in light of the parties' intentions," with ambiguities resolved in the Indians' favor. *Id.* But treaty rights must be rooted in text; this Court has consistently refused to add unwritten rights to treaties based solely on alleged understandings. *See, e.g., Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770-71 (1985) (rejecting claim of right not mentioned in treaty text); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432

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[1] *See also Medellin v. Texas*, 552 U.S. 491, 506 (2008) ("[I]nterpretation of a treaty, like the interpretation of a statute, begins with its text.").

(1943) ("Indian treaties cannot be re-written or expanded beyond their clear terms to . . . achieve the asserted understanding of the parties.").

The Court has been especially careful about requiring a textual basis for claimed rights that would interfere with off-reservation taxes. "[W]hen a State asserts its taxing authority outside of Indian country," Indians going beyond reservation boundaries are subject to non-discriminatory state taxes "'[a]bsent express federal law to the contrary.'" *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 112-13 (2005) (second alteration in original) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

Cougar Den never even argues that it can prevail under the "express-federal-law" rule, and understandably so: the Treaty contains no language about trade, transporting goods, taxes, or anything else exempting Yakamas from Washington's fuel tax. Instead, the company offers several arguments to escape this rule. None succeeds.

First, Cougar Den claims that the "express-federal-law" rule conflicts with *Tulee*, 315 U.S. 681, which invalidated Washington's fishing license fee as to Yakama Indians. Resp. 51. But this Court cited *Tulee* as an example *applying* the "express-federal-law" rule in *Mescalero*, 411 U.S. at 148-49, and with good reason. The treaty in *Tulee* contained an express "right of taking fish," and Washington's fee burdened that "very right." 315 U.S. at 685.

Tulee also rebuts Cougar Den's strawman argument that the State is claiming that a treaty must "'clearly' and 'unambiguously' refer[] to *taxes*" to preempt state taxes. Resp. 51. The State never said that, and as *Tulee* shows, a tax may be preempted if it burdens the "very right" the treaty creates, even if the treaty never mentions taxes. 315 U.S. at 685. But that does not mean treaties can preempt taxes on activities never mentioned.

Cougar Den also errs in claiming that the "express-federal-law" rule conflicts with normal rules of treaty interpretation, such as considering intent or construing ambiguities in tribes' favor. Resp. 52. This Court routinely applies these rules with the "express-federal-law" principle. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465-66 (1995); *Klamath*, 473 U.S. at 765 & n.16. But intent alone cannot create a right nowhere mentioned in the "express federal law" of treaty language. *See, e.g., Choctaw Nation*, 318 U.S. at 432.

Cougar Den goes on to claim that *Mescalero*'s "express-federal-law" rule applies only to interpreting statutes, not treaties. Resp. 54-55. But this Court has never said that, and it has cited the *Mescalero* rule in treaty-interpretation cases. *See, e.g., Chickasaw Nation*, 515 U.S. at 465; *Klamath*, 473 U.S. at 765 & n.16. Moreover, when the *Mescalero* Court held that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State" "[a]bsent express federal law to the

contrary," it cited a number of treaty cases to support the point, including *Tulee*. *Mescalero*, 411 U.S. at 148-49 (citing *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968); *Tulee*, 315 U.S. at 683).[2]

Finally, Cougar Den cites *McClanahan v. Tax Commission of Arizona*, 411 U.S. 164 (1973), to claim that the "express-federal-law" rule is "irreconcilable" with the rule that States generally cannot tax reservation lands and reservation Indians. Resp. 52-53. But *McClanahan* was decided the same day as *Mescalero* and emphasized that, for historical reasons unrelated to treaty language, rules for taxing Indians outside a reservation differ starkly from rules for on-reservation taxation. 411 U.S. at 168; *see also, e.g.*, Opening Br. 18-24; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162 (1980) (citing *Mescalero* in explaining that state authority "outside the reservation . . . is considerably more expansive than it is within reservation boundaries").

In sum, the "express-federal-law" rule applies here, and Cougar Den effectively concedes it cannot prevail under that standard.

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[2] Cougar Den also claims the Court should treat state and federal taxes differently. Resp. 55-57. Again, this Court has never said that. Indeed, in *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936), the Court held a state income tax applied to an Indian's income from mineral leases for the same reasons the federal income tax did. And although *Mescalero* dealt with state taxes, it cited federal tax cases in explaining that exemptions are not granted by implication. 411 U.S. at 156.

2. Cases interpreting the "right of taking fish" create no right to transport goods without taxation of those goods

Seeking to escape the rule that only express federal law preempts off-reservation taxes, Cougar Den claims that this Court's cases interpreting the Yakama Treaty's "right of taking fish" require a different approach. The company argues that because this Court has interpreted the fishing clause to exempt Yakamas from non-discriminatory fees on fishing, it must interpret the highway-travel clause to exempt Yakamas from non-discriminatory taxes on goods transported by highway. Resp. 19-27. This argument fails on two levels.

First, even if the fishing cases controlled here, they provide no basis for exempting Cougar Den from Washington's fuel tax. *Tulee* held that the "right of taking fish" preempts non-discriminatory charges for exercising that "very right." 315 U.S. at 685. Here, the "very right" the Treaty protects is "travel upon all public highways." Washington's fuel tax does not tax "travel upon all public highways." *Infra* 16-21. It taxes fuel possession "regardless of whether Cougar Den uses the highway." Pet. App. 13a.

To bridge this gap in its reasoning, Cougar Den claims that the Treaty implicitly creates a "right to transport . . . goods on the highway." Resp. 20. It argues that this right must be inferred based on *Yakama Indian Nation*, 955 F. Supp. 1229. Cougar Den is wrong, as detailed below. *Infra* 10-15. But even if there were an implicit right "to transport goods on

the highway," Washington's fuel tax would not burden that "very right." It is not a tax on "transporting goods by public highway," it is a tax on the goods themselves (fuel) that applies "regardless of whether Cougar Den uses the highway." Pet. App. 13a; *infra* 16-21.

The distinction between a tax on "transporting goods by highway" and a tax on the goods themselves is meaningful. This Court has often drawn similar distinctions. For example, *Mescalero* held that although federal law preempted a state tax on "permanent improvements" on land, it did not preempt taxing income the Tribe earned from the land, because "[o]n its face, the statute exempts land and rights in land, not income derived from its use." 411 U.S. at 158, 155; *see also, e.g.*, *Superintendent of Five Civilized Tribes v. Comm'r of Internal Revenue*, 295 U.S. 418, 421 (1935) (holding tax exemption for land did not extend "to income derived from investment of surplus income from [the] land").

The second flaw in Cougar Den's reasoning is that the history and text of the fishing and highway-travel clauses differ substantially, limiting the relevance of fishing-clause cases here.

As to history, the Court has emphasized in interpreting the fishing clause that it protected pre-existing rights that had always belonged exclusively to Indians. *See Tulee*, 315 U.S. at 684 (describing the fishing clause as conferring "continuing rights" preserving the tribes' "immemorial customs"); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443

U.S. 658, 676-79 (1979); *United States v. Winans*, 198 U.S. 371, 381-82 (1905). By contrast, while Yakamas had long traveled on rivers and trails, the right "to travel upon all public highways" was new, addressing travel on future highways built by the government. U.S. Br. 29 n.6. Cougar Den acknowledges as much, recognizing that "[t]he Yakamas of 1855 traveled on Indian trails," not public highways. Resp. 32. The Treaty's text and negotiating history confirm a forward-looking right. The text provided that "roads may be run through the said reservation," JA 80a, and guaranteed the tribe a reciprocal right of access to future highways, and the negotiators emphasized that the highway-travel right was new. *See, e.g.*, JA 66a ("[A]s we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country[.]").

Textual differences amplify these historical differences. Cougar Den emphasizes that both clauses use the phrase "in common with," but that phrase modifies different things in the two clauses. The fishing clause promises "the right of taking fish at all usual and accustomed places, in common with citizens[.]" JA 81a. Thus, "in common with" modifies "taking fish," not the "right"—Indians and non-Indians will take fish in common, but will not have the same right in common. *See* Statement as to Jurisdiction, *Tulee v. Washington*, No. 318, 1941 WL 52780, at *29 (U.S. June 30, 1941); *Fishing Vessel*, 443 U.S. at 677-78. By contrast, the highway-travel clause guarantees "the right, in common with citizens of the United States, to travel upon all public

highways." JA 80a-81a. Here, "in common with" modifies "right"—the right itself is shared in common.[3]

In any event, this Court held decades ago that it was "*despite the phrase* 'in common with citizens of the territory'" that the fishing clause "conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy[.]" *Tulee*, 315 U.S. at 684 (emphasis added). The Court put "greater importance" on "other words in the treaties," especially "the right of *taking* fish," which had to be interpreted against the historic backdrop of Indians' exclusive right to fish. *Fishing Vessel*, 443 U.S. at 678. As just explained, there is no such historic backdrop to highway travel. And here, "other words in the treaty" confirm that the highway-travel right is narrower than Cougar Den claims. The highway-travel right comes immediately after a clause promising "free access from [the Reservation] to the nearest public highway[.]" JA 80a. Clearly, the "right, in common with citizens of the United States" meant something different than "free access." *See* U.S. Br. 29.

Cougar Den claims the highway-travel clause would be meaningless if it guaranteed Yakamas only the right to travel on non-Indian roads like non-Indians. Resp. 25. The Court need not decide whether the highway-travel clause gives Yakamas rights beyond those of others, because Cougar Den loses even

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[3] *See* Pet. 28 n.7 (discussing U.S. Brief in Opposition in *Ramsey v. United States*, No. 02-1547).

if Yakamas have a special right to travel without taxation of *that travel*. But Cougar Den is wrong in any event. At the time of the Yakama Treaty, state and federal policies sometimes prevented tribes from leaving their reservations. Opening Br. 38. This clause protected the Yakama against such policies. Two amici tribes with an identical highway-travel clause confirm the importance of the treaty right as written, citing how Governor Stevens invoked the clause to prevent people from blocking Nez Perce Indians traveling on a major road. Nez Perce/CSKT Br. 23-27.

In short, nothing in this Court's fishing-clause decisions justifies rewriting the highway-travel clause to create rights it never mentions.

3. The district court's findings in *Yakama Indian Nation* create no right to transport goods without taxation of those goods

Cougar Den's extraordinary reliance on *Yakama Indian Nation*, 955 F. Supp. 1229, is equally unavailing. Cougar Den is free to cite facts from that decision, but the relevance of those facts and the Treaty's ultimate meaning are legal questions for this Court. Cougar Den thus errs in relying on *Yakama Indian Nation* to support a central premise in its brief: that the highway-travel clause creates an independent "right to transport goods" that amounts to express federal law preempting taxation of those goods. Resp. 20.

Cougar Den repeatedly cites legal conclusions from *Yakama Indian Nation*,[4] but treaty interpretation is an issue of law reviewed de novo. *See, e.g.*, *Klamath*, 473 U.S. at 766 (rejecting lower courts' interpretation of treaty without deference); *Winans*, 198 U.S. at 380-82 (same). And this Court routinely conducts its own analysis of the historical record in treaty cases to determine the parties' intent and understanding, without deference to lower courts. *See, e.g.*, *Chickasaw Nation*, 515 U.S. at 455, 466-67 (analyzing parties' understanding of treaty language and rejecting lower courts' interpretation, even though those courts had "endeavored to 'rea[d] the treaty as the Indians [who signed it] would have understood it'" (alterations in original)); *Fishing Vessel*, 443 U.S. at 675-78; *Tulee*, 315 U.S. at 684-85.

It is thus remarkable that Cougar Den relies on *Yakama Indian Nation* as its sole authority to assert an "established proposition" that the highway-travel clause provides a right to "transport . . . goods." Resp. 20. The Court need not decide whether the Treaty creates such a right, because Washington taxes fuel possession, not fuel transportation. *See infra* 16-21. Regardless, *Yakama Indian Nation* provides no basis for inferring such a right for several reasons.

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[4] *See, e.g.*, Resp. 23 (citing *Yakama Indian Nation* about the meaning of treaty language), 24 (citing *Yakama Indian Nation* for the proposition that the Treaty guarantees "the right to travel on all public highways without being subject to any licensing and permitting fees"), 30 (citing legal reasoning from *Yakama Indian Nation*).

First, as just explained, whether the Treaty creates a right to transport goods is a legal question, not one meriting deference to a lower court. Even the district court's statements about how the Yakama understood the Treaty are based primarily on treaty language and the minutes of the treaty council, materials this Court can review itself. *See, e.g.*, *Fishing Vessel*, 443 U.S. at 675-78; *Tulee*, 315 U.S. at 684-85.[5]

Second, *Yakama Indian Nation* addressed a narrow question quite different from the issue here. The case involved truck licensing fees charged as a pre-condition to highway use, 955 F. Supp. at 1232-33, i.e., "fees imposed *for use of* the public highways," *id.* at 1253 (emphasis added). It did not consider a tax on goods, like the one here, that does not depend on highway use. Pet. App. 13a. Moreover, that case involved what the court called "tribal goods," namely, timber cut on the Yakama Reservation. *Yakama Indian Nation*, 955 F. Supp. at 1232-33. The court repeatedly couched its conclusions as addressing state fees on "hauling tribal goods to market." *Id.* at 1249, 1235, 1245, 1262, 1267. Any conclusions beyond this situation are dicta.

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[5] The district court also based its conclusions about likely Yakama understanding on testimony from a tribal member born 70 years after the Treaty was signed. *Yakama Indian Nation*, 955 F. Supp. at 1236-37, 1247. That purported understanding was contradicted by decades of conduct by the parties. *See, e.g.*, *id.* at 1254-55 (noting that the Yakamas paid vehicle registration fees for decades without dispute and never asserted a right to avoid state laws under the highway clause until the 1980s).

Third, Cougar Den's reasoning proves too much. The company argues that *Yakama Indian Nation* demonstrates a right to transport goods for trade because of two conclusions it reached: (1) trade was important to the Yakama; and (2) treaty negotiators said the Yakama could continue to travel to trade. Resp. 20. But those same conclusions are true for many other activities that the highway-travel right facilitates. For example, fishing and hunting were vitally important to the Yakama, and the treaty negotiators said that the Yakama could continue to travel for these purposes.[6] But that does not mean that the highway-travel right created a right to fish or hunt. Instead, the Treaty includes separate clauses protecting those rights, clauses that would have been unnecessary if the highway-travel right already protected them. Similarly, although one of the purposes of the highway-travel clause was to allow the Yakama to trade, Cougar Den admits (contrary to decades of arguments by the Yakama Nation) that the Treaty creates no stand-alone right to trade, and that the State can tax off-reservation Yakama trade. Resp. 35-36. Thus, just because the highway-travel right facilitates important activities like trade, fishing, and transporting goods, does not mean it creates rights to engage in those activities. While the highway-travel

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[6] *See, e.g., Yakama Indian Nation*, 955 F. Supp. at 1239 ("Travel was essential with respect to the Yakamas' custom of taking fish."), 1240 ("You will be allowed to go to the usual fishing places . . . ."), 1263.

right *applies* when Yakamas transport goods for trade, just as it applies when they travel to fish, hunt, or visit family, that does not mean it creates a *right* to transport goods for trade.

Cougar Den seeks to avoid the multitude of problems with *Yakama Indian Nation* by claiming that the State is "collaterally estopped" from challenging its findings. Resp. 17. Nonsense. Cougar Den's argument is based on statements by the administrative law judge and superior court below. Both are irrelevant. In Washington, when an agency director reviews an ALJ's decision (as here), the director's decision becomes the agency's decision, including as to facts. *See Tapper v. Emp't Sec. Dep't*, 122 Wash. 2d 397, 404 (1993) (citing Wash. Rev. Code 34.05.464(4)). The Director of the Department of Licensing never relied on factual findings from *Yakama Indian Nation* in her decision; instead, she distinguished its reasoning. Pet. App. 44a-61a. The State therefore had no reason to quibble with the agency's decision when Cougar Den sought judicial review in superior court. And the superior court's statements about *Yakama Indian Nation* became irrelevant once the State appealed that court's decision to the Washington Supreme Court; under Washington law, an appellate court "sits in the same position as the superior court," directly reviewing the agency's decision, not the superior court ruling. Pet. App. 4a; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wash. 2d 909, 915 (2008).

In short, nothing in *Yakama Indian Nation* controls here, and nothing in the decision creates or even addresses the right Cougar Den claims: to escape taxes on goods simply because they are transported by highway.

4. Transporting goods in the "ceded area" does not make them exempt from tax

In a final effort to expand the highway-travel clause beyond its text, Cougar Den makes a confusing argument about its "preexisting tax exemption" in the "ceded area." Resp. 28-35. The company's argument seems to be that because there were no state taxes within the Yakama's historic territory at treaty time, the State cannot tax goods the Yakama transport within that territory today. This argument contradicts basic tenets of Indian law and cannot withstand scrutiny.

Virtually nothing the Yakama did in 1855 was taxed, but that does not mean the Yakama are exempt from taxes today. For example, a Yakama member farming in the Tribe's historic territory would have faced no federal income taxes or state taxes before 1855. But a Yakama farmer today is unquestionably subject to tax if he lives outside the Yakama Reservation, even if he lives in the area ceded by the Tribe. Whether the land is "ceded territory" makes no difference. Cougar Den's reliance on the principle that "Indians are immune from state tax based on their activity in Indian country" is a red herring. Resp. 30. "Indian country" and "ceded territory" are not the same thing. *See* 18 U.S.C. § 1151 (defining "Indian country").

Cougar Den seems to suggest that because the Yakama could travel within the ceded area free of taxes in 1855, the Treaty must allow them to do so now. Resp. 29-30. This argument proves too much. When the Yakamas traveled in their own territory in 1855, they could buy and sell goods without taxation. But that does not mean freedom from sales taxes became part of the highway-travel right; Cougar Den concedes that it did not. Resp. 35-36.

Finally, Cougar Den's argument mischaracterizes the treaty's negotiating history. The company repeatedly claims that Governor Stevens promised the Yakama "the 'same libert[y] outside the reservation' *as within it* 'to go on the roads to market.'" Resp. 6, 20 (alteration in original) (emphasis added). That is not what Stevens said. When Stevens said Yakamas would have the "same liberties outside the reservation . . . to go on the roads to market," he was saying that their off-reservation rights would be the same as those of the Nez Perce Tribe, whose rights he had just described. *See* Treaty Minutes, App. 70-71 (attached to Yakama Amicus Br.). He made this statement while listing other ways in which the rights of the Yakama would mirror those of the Nez Perce. *Id.* at 71. Cougar Den's description of his statement is unsupportable.

B. Washington's Fuel Tax Does Not Tax Travel by Public Highway

Unable to demonstrate the Yakama Treaty creates a right to transport goods without taxation of those goods, Cougar Den argues in the alternative that Washington's fuel tax is preempted because it

actually taxes the Treaty-protected right to travel by public highway. Its arguments fail.

Cougar Den first claims that Washington's fuel tax "is preempted regardless of whether it is a 'possession' or 'transportation' tax" because it is impossible to separate the two concepts. Resp. 28, 37. That is incorrect under Washington law, as the facts of this case demonstrate.

Cougar Den also argues that Washington's tax is preempted because one trigger for the tax is importation. Resp. 39-50. But the tax applies to fuel obtained inside and outside of Washington, and it applies to fuel that is imported by means other than public highway. Characterizing it as an "import tax" does not turn it into a tax on using public highways.

1. Washington's statutes tax fuel possession, not highway travel, and are not preempted

Cougar Den's argument depends on the false premise that Washington's fuel tax amounts to "taxation on travel." Resp. 29. It does not.

As the State and the United States explained in prior briefing, Washington taxes fuel possession, not fuel transportation. Opening Br. 6-9, 25-28; U.S. Br. 3-5, 18-21. The tax is assessed on the first possession of each gallon withdrawn from a refinery or terminal in the State or brought into the State. JA 119a-20a, 126a-28a; Wash. Rev. Code 82.36.020, .022, 82.38.030. The tax does not turn in any way on travel by public highway, as the Washington Supreme Court acknowledged. Pet. App. 13a.

Cougar Den's only response is to claim that it makes no difference whether the tax is on possession or transportation because "[p]ossession is inherent in transportation. It is impossible to transport something without possessing it." Resp. 36; *see also id.* at 3, 37-39. That argument misunderstands Washington law, as the facts of this case show.

Fuel possession and fuel transportation are distinct, separable acts under Washington's fuel tax statutes. When fuel enters the State, the "owner" of the fuel owes the tax, regardless of who transports it. Pet. App. 40a, 55a (citing Wash. Rev. Code 82.36.020(1), .100, 82.38.030(1)).

The facts here demonstrate this point. Cougar Den purchased fuel in Oregon, but hired a contractor (KAG West) to transport it into Washington. Pet. App. 52a-55a, 40a. KAG West transported the fuel, but Cougar Den owned it. *Id.* Because "[o]nly the owner of the fuel is subject to tax" under Washington law, it was Cougar Den, not KAG West, that owed the tax. Pet. App. 40a.

The point is *not* that Cougar Den loses because it hired someone else to transport fuel; it would make no difference if Cougar Den transported fuel itself. The point is that regardless of who does the transporting, Washington's tax is on fuel possession, not fuel transportation.

Given this, Cougar Den inadvertently concedes that it should lose. The company admits that "the State could tax an act that occurred *during* off-reservation highway travel, so long as that act is distinct from the highway travel itself." Resp. 36. That is the situation here. The State is taxing fuel

possession, and possessing fuel is distinct from transporting it, as Washington's statutes and the facts here show. Cougar Den's claim thus fails under its own theory.

2. Characterizing Washington's tax as an "import" tax does not turn it into a tax on highway travel

Equally unavailing is Cougar Den's argument that Washington's tax is preempted because one trigger for the tax is possessing fuel when it enters the State. Cougar Den asserts that "a tax *expressly* triggered by the exercise of treaty-protected activity is preempted," and that "importation" triggers the tax. Resp. 39. But even accepting these premises, Washington's tax is not expressly triggered by "travel upon all public highways."

To begin with, Cougar Den makes much of the state court's description of this tax as an "import tax." Resp. 40-42. The company claims that, under *Wagnon*, this description is dispositive. Resp. 43. But *Wagnon* deferred to state law as to "who" bore the tax and "where" it applied. 546 U.S. at 102, 103-09. Here, it is undisputed that the tax applies to Cougar Den and that its incidence is off-reservation. Pet. App. 4a-5a, 22a, 55a. Thus, the "frequently dispositive question[s]" at issue in *Wagnon* are undisputed here. 546 U.S. at 101. The question here, unlike in *Wagnon*, is whether the tax burdens the federal treaty right "to travel upon all public highways."

Washington's fuel tax does not burden the right "to travel upon all public highways" for the same reasons it is not a tax on travel. In particular, the tax does not depend, in any way, on use of public

highways. Pet. App. 13a. As the United States explained: "The fact that the first possession for some regulated parties will occur on a highway does not convert an excise tax on that possession into a tax on the use of the Highway . . . any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway." U.S. Br. 20.

Cougar Den's flawed response is that travel "is essential" to its tax liability under Washington's fuel statutes, while travel is merely "incidental" in the example above. Resp. 40. Not so.

First, it is not true that "Respondent's travel . . . is essential" to the imposition of the tax. Resp. 40. As the facts of this case show, Respondent is liable for the tax even when it does not travel at all, so long as it owns fuel entering the State.

Moreover, Cougar Den would owe the tax even if it imported fuel by means other than public highway. If, for example, Cougar Den used a private toll road to import fuel, it would still owe the tax. Similarly, Cougar Den would have owed the tax if it brought fuel into Washington via pipeline or barge. Cougar Den claims that the tax does not apply to fuel brought in by these means, Resp. 47, but that is true only if the importer has a State license and the fuel is on its way to a terminal or refinery, such that the tax will be collected later. Wash. Rev. Code 82.36.020(2)(c), .080(3). If the entry is by "bulk transfer," i.e., "by pipeline or vessel," Wash. Rev. Code 82.36.010(4), and "the importer is not a licensee," then

the tax applies when fuel enters the State. Wash. Rev. Code 82.36.020(2)(c)(i); Pet. App. 54a-55a ("Washington fuel taxes are imposed when fuel 'enters into this state' . . . if the entry is by bulk transfer and the importer is not a licensee."). Cougar Den was not a licensee and thus would have been taxed if it used these methods to import fuel. Even Cougar Den admits that the tax applies to deliveries by pipeline or barge in "unusual situations involving unlicensed entities." Resp. 47. Cougar Den fails to mention it was an unlicensed entity.

In short, even if Washington's fuel tax is an "import tax," it is not a tax on using public highways. Use of the highway was incidental to Cougar Den's tax burden, not "essential." Resp. 40. Cougar Den thus again loses under its own theory.

C. The Fiscal and Regulatory Concerns of the State and Its Amici Are Real

Cougar Den falsely claims the "sole practical issue" in this case is Washington's authority to tax fuel transported to the Yakama Reservation. Resp. 59. A State losing tens of millions in tax revenue is noteworthy on its own, but accepting Cougar Den's argument would have far broader impacts, jeopardizing a range of state taxes and regulations.

1. Ruling for Cougar Den would imperil many state taxes

If this Court rules that Yakama businesses can avoid taxes by transporting goods by highway, it will wreak havoc on state tax systems.

Starting with fuel taxes, ruling for Cougar Den would allow the company to ship untaxed fuel to over twenty-four Indian reservations in Washington that contain gas stations, which sell millions of gallons of gasoline annually.[7] Cougar Den could also ship untaxed fuel to reservation gas stations in other states, a practice other Yakama-owned companies are already attempting. *See Salton Sea Venture, Inc. v. Ramsey*, No. 11-cv-1968-IEG, 2011 WL 4945072, *7 (S.D. Cal. Oct. 18, 2011). Another Yakama-owned company, First American Petroleum, is advertising its ability to use the Yakama Treaty to gain an "economic advantage" on fuel deliveries to reservations nationwide. http://www.firstamericanpetro.com/about-us/.

Cougar Den's facile response is that the State could simply move the incidence of its fuel tax to consumers but is unwilling to do so for political reasons. Resp. 60. But the State already tried what Cougar Den proposes, and it was struck down by a federal court. *See Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). Even if the State tried again, putting the incidence on consumers raises two serious practical concerns. First, because the tax would be collected by thousands of fuel retailers rather than a much smaller number of large fuel companies, tax evasion would be a more serious threat. And second, this approach would impose painstaking recordkeeping obligations on Indian and non-Indian fuel retailers throughout Washington, precisely the sort of burdens that tribes have opposed in the past. There is no reason they should have to

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[7] Opening Br. 8 n.4.

bear this burden based on Cougar Den's unsupported treaty interpretation.

Moving beyond fuel taxes, Cougar Den's misguided approach would preempt any tax that turns on first possession in a state if the first possession occurs on the highway. There are many such first-possession taxes, and they serve important purposes. For example, when cigarettes enter Washington, the owner of the cigarettes must pay Washington's cigarette tax and affix stamps as proof-of-payment. Wash. Rev. Code 82.24.020, .040(2). Yakama-owned companies are already citing the decision below to argue that other states' cigarette taxes are preempted. *See* Br. & Special App. of Appellant-Cross-Appellee at 51-53 & n.21, *New York v. Mountain Tobacco Co.*, No. 17-3198/17-3222 (2d Cir. Feb. 20, 2018).

Cougar Den responds that States can simply change cigarette and other taxes to apply to "the off-reservation purchase or sale of goods." Resp. 61. But States have good reasons to structure their taxes as they have. For example, with cigarettes, taxing first possession, and requiring stamps as proof-of-payment, enables the states and federal government to track the movement of cigarettes and prevent tax-free contraband from being sold off-reservation, or on the reservation to non-Indians.

2. Cougar Den's reading threatens state regulations as well

Cougar Den claims its reading of the highway-travel clause would preempt only taxes, not regulations. Resp. 26-27. The distinction makes little sense.

Cougar Den cites no case holding that Indian treaties generally preempt taxes more readily than other laws. In fact, *Mescalero* held that the principle that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law" is "as relevant to a State's tax laws as it is to state criminal laws[.]" 411 U.S. at 148-49.

Nonetheless, Cougar Den contends that fishing-clause cases and *Yakama Indian Nation* establish that the Treaty preempts taxes but not rules "to protect public safety or to ensure the free and safe use of the highways." Resp. 26. Those cases do no such thing. Fishing-clause cases have distinguished taxes only from regulations "necessary for the conservation of fish," not regulations generally. *Tulee*, 315 U.S. at 684; *Fishing Vessel*, 443 U.S. at 682 ("[T]reaty fishermen are immune from all regulation save that required for conservation."). And *Yakama Indian Nation* cited fishing cases in saying only that the State could enforce laws "to preserve and maintain the condition of the roads." 955 F. Supp. at 1257.

These cases thus say nothing that would save many important state laws, such as public safety laws restricting possession of explosives, firearms, or drugs. If, as Cougar Den contends, the Yakama Treaty creates a right "to transport goods" by highway, there is no clear rationale allowing the State to prohibit Yakamas from possessing such dangerous goods on the highway. These cases also say nothing about state laws designed to protect the State's economy, *see, e.g.*, Opening Br. 44 (offering example of law to protect State's apple crop), or to protect the environment (such as vehicle emission standards).

Cougar Den's argument is also counter-intuitive. Under the company's theory, the State can ban transportation by highway of goods (like fuel) for public safety reasons, but cannot impose a generally applicable tax on those same goods if they happen to be transported by highway. There is no basis for such an absurd rule in the Treaty's text, history, or precedent.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

RESPECTFULLY SUBMITTED.

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October 17, 2018

No. 16-1498

In The Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
a Yakama Nation Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT COUGAR DEN

In its brief, the Solicitor General endorses the Ninth Circuit's interpretation and application of the 1855 Treaty with the Yakama Nation, yet follows with a lukewarm recommendation that this Court grant review of the Washington Supreme Court's ruling. The Solicitor General's brief only highlights the reasons that this Court should deny the petition. To support its statement that the decision to recommend review is even a "close question," the Solicitor General avers that (i) the Washington Supreme Court erred in characterizing the Washington tax statute at issue and (ii) this alleged error creates "tension" with the Ninth Circuit. These arguments in support of review are fundamentally flawed.

I. The Solicitor General's Disagreement with the Washington Supreme Court's Interpretation of the Washington Fuel Tax Does Not Merit Certiorari

a. The Solicitor General first argues that the Washington Supreme Court committed error in its characterization of the state tax statute at issue. This Court typically does not sit to correct error. *See* SUP. CT. R. 10.

The Solicitor General does not assert that there is a dispute involving any federal question. *See* Br. at 19 ("both parties accept the Ninth Circuit's federal-law framework for evaluating whether a state law runs afoul of Article III of the Treaty"). Given the lack of

uncertainty in the proper treaty construction, the Solicitor General's claim that the Washington Supreme Court incorrectly construed a Washington statute supplies no reason to grant review.

b. Review for error correction is especially inappropriate where the purported error in question has to do with a state supreme court's construction of a state statute. The Washington Supreme Court engaged in statutory interpretation of a Washington state statute and held that the Washington statute taxes importation. Only after the court held that the statute taxed Respondent's importation of fuel into the State and to the Yakama Reservation did the court hold that the state statute, so construed, impermissibly burdened the right to travel guaranteed by the Treaty.

c. Moreover, the Washington Supreme Court committed no error—it correctly construed the Washington statute as a tax on Cougar Den's importation of fuel through the State and onto the Yakama Reservation, burdening the Right to Travel preserved by the 1855 Treaty.

The Solicitor General asserts that the state law's import provision should be read in some broader context. Br. at 12. Notably absent from the Solicitor General's assertion of error by the Washington Supreme Court—and indeed by every judicial officer in Washington to review this state statute—is any discussion or understanding of Washington statutory construction, tax law, or the state constitutional mandate that all fuel tax revenue must be used for the maintenance and

improvement of highways. Instead, the Solicitor General wholly adopts the two justice dissent below, without additional analysis or authority.

Seven justices of the Washington Supreme Court addressed and rejected the argument that the import taxes assessed under Former Revised Code of Washington sections 82.36.020(2) and 82.38.030(7) are anything other than a tax on "bringing goods to market." Washington imposes a point-of-sale tax on fuel when fuel is removed from the terminal rack and an import tax when fuel is "imported" into the state. *See* Former Wash. Rev. Code. §§ 82.36.020(2) & 82.38.030(7). Here, as the Washington Supreme Court explained below, "Cougar Den is being taxed for importing fuel" through Washington to its destination on the Yakama Reservation. Pet. App. 1a. Accordingly, the Washington Supreme Court considered the nature of Washington's tax on that activity.

Washington's fuel tax is plainly not a tax on the possession of fuel itself: a tax is assessed on (a) the ***transfer*** of fuel from the terminal rack to a distributor or (b) the ***importation*** of fuel into the state.[1] Former

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[1] The Solicitor General does not support its statement that the triggering event is irrelevant to the character or nature of the tax and Washington law rejects that argument. It is well established that the nature of a tax is revealed by examining the subject matter of the tax, the manner in which it is assessed, and the measure of the tax. *Harbour Village Apartments v. City of Mukilteo*, 139 Wash. 2d 604, 989 P.2d 542 (1999). Washington follows basic hornbooks in repeatedly and emphatically rejecting claims that taxes on transactions or on the right to use or transfer things are 'axes on the property themselves. *See, e.g.*, *Black v. State*, 67 Wash. 2d 97, 99-100, 406 P.2d 761 (1965).

Wash. Rev. Code §§ 82.36.020(2) ("the tax . . . is imposed ***when any of the following occurs***") (emphasis added) & 82.38.030(7). The fuel tax statutes define "import" as "to bring . . . fuel into [the] state," other than through a "pipeline or vessel" and subject to other exemptions. Former Wash. Rev. Code §§ 82.36.010(10) & 82.38.020(12). Several categories of possessed fuel, such as fuel located in "the fuel supply tank of a motor vehicle" and wholesale fuel passing through Washington to another out-of-state market are exempt. *Id.* Read with fidelity to the text as a whole and in context, in accordance with Washington's canons of statutory construction, the Washington Supreme Court properly concluded that the tax burdened activity rather than possession.

Moreover, the Solicitor General's interpretation of the Washington statute is irreconcilable with its prior interpretation of the Kansas tax upheld in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), which Petitioner and the Solicitor General represent to operate in the same manner.[2] *See* Br. at 11 ("Washington tax thus operates in the same way as the tax upheld by this Court in *Wagnon*"). There, the Solicitor General relied upon the triggering events to conclude that the tax was "by definition an excise or sales tax

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[2] Respondent does not concede that the taxes are identical or that Washington's 2007 Amendments successfully moved the incidence off of tribal retailers. The Washington Supreme Court expressly has not addressed that question. *See Automotive United Trade Organization v. Washington*, 183 Wash. 2d 842, 856, 357 P.3d 615 (2015).

that is expressly levied on the use, sale, or delivery of fuel," whereas here the Solicitor General ignores the operative verbs and triggering events to conclude that the same tax is assessed on possession, regardless of the triggering event. *Compare* Amicus Brief of United States at 13-14, Case 04-631 (filed July 14, 2005), *with* Br. at 12-13.

Regardless, the Solicitor General's position that this Court might have construed the state statute differently in the first instance is irrelevant. It is axiomatic that "a State's highest court is the final judicial arbiter of the meaning of state statutes." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

II. The Solicitor General Manufactures "Tension" by Assuming that the Washington Supreme Court Interpreted Its Statute Erroneously

a. The Solicitor General next suggests that the decision below "is in tension with" decisions from the Ninth Circuit. The Solicitor General does not allege a conflict, which of course is this Court's criterion for granting review. The Solicitor General's choice and supporting analysis undermines the Petition for Review, which rests on the premise that "[t]he Washington Supreme Court majority's view of the treaty is diametrically opposed to the Ninth Circuit's." Pet. at 20.

b. The Solicitor General refrains from alleging a conflict for good reason. First, the tension only exists if this Court rejects the state supreme court's construction of the Washington tax statute. Second, and even

with that predicate assumption, the tension alleged is with only one case, *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), which rests on an entirely different set of facts.

In determining whether the Treaty is an express federal law exempting the Yakama Nation from a nondiscriminatory state law, the Ninth Circuit (i) considers the nature or character of the restriction or condition imposed by the state law and (ii) the meaning of the "Right to Travel" provision in the Treaty. *See Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) ("*Cree I*") (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1979)). As the Government recognizes, this framework is not contested and courts applying this framework have uniformly defined the meaning of the "Right to Travel" provision: the provision preempts state laws that restrict or place conditions on (a) travel, including encumbrances on Yakamas "bringing goods to market," but not (b) encumbrances on the sale of goods. Br. at 14, 19; *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"); *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007); *King Mountain Tobacco*, 768 F.3d 989.

The Solicitor General discusses these three Ninth Circuit cases and it does not allege any tension between the state court ruling and *Cree II* and *Smiskin*. The only alleged "tension" is with *King Mountain Tobacco*, which, as thoroughly addressed in Respondent's Brief in Opposition, considered an escrow statute imposing a mandatory flat-fee payment assessed on every unit of

tobacco sold. 768 F.3d at 997-98. To manufacture this "tension," the Solicitor General adopts the position advanced by the dissenting opinion below that would have interpreted Washington's import tax as a tax on ownership rather than importation. Br. at 19 (citing Pet. App. 26a (Fairhurst, C.J., dissenting)).

The state supreme court's analysis of the Washington fuel tax scheme cannot be revised to manufacture a conflict. Because the Washington Supreme Court's construction of the local statute rests on purely state law, that construction is conclusive. The only question remaining is "whether the statute so construed and applied" is preempted by the Treaty. *See Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 483 (1942). The Solicitor General acknowledges that any state burden on the Yakama's right to transport goods to market over public highways would be preempted. If this Court recognizes the Washington Supreme Court's holding that Washington's fuel tax burdens the transportation of fuel, then a holding that the Treaty Right to Travel preempts the state tax is inescapable.

III. The Solicitor General's Unsubstantiated Claims of Harm Do Not Merit Certiorari

a. As a final effort to support its tepid recommendation for certiorari, the Solicitor General speculates that this ruling construing Washington law could be applied to other treaties and other goods in different states with different laws.

The Solicitor General raises the specter that the decision below might be applied beyond its specific facts. Br. at 21. Yet the Solicitor General, like the Petitioner, fails to identify any other Washington law that might be preempted by the Treaty Right to Travel when a Yakama Nation member travels.

As for concerns about other states, the Solicitor General effectively asks this Court to identify and interpret unspecified state taxes—other than the Washington fuel tax—that might burden travel and therefore be preempted. And again, because there is no dispute over the meaning of the treaty right, any such analysis would turn on the character and nature of the challenged state tax. In any event, this would be a matter to be determined if and when such a preemption challenge was entertained.

Further, the Solicitor General's speculative concerns about the future and far flung implications of the decision below fail to consider the limited extent of that holding. The Washington Supreme Court adopted the factual findings in *Yakama Indian Nation v. Flores*, which found that the Treaty protected the right to travel within Washington but did not define the full geographic scope of that right. 955 F. Supp. 1229, 1261-67 (E.D. Wash. 1997). This limitation makes for a poor vehicle to address the Solicitor General's hypotheticals: any court considering the potential preemptive effects of the Treaty of 1855 in another state, such as Kansas, would have to engage in factfinding in order to construe the Treaty according to the understanding of the Indians at the time. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("treaties with the

Indians must be interpreted as they would have understood them"). Specifically, that future court would inquire into the Yakama Nation's expectations and the scope of the rights they thought they were reserving.

b. The Solicitor General strangely opines that it would be difficult for the Washington State Legislature to structure its fuel tax in a manner that circumvents the Yakama Nation's treaty rights. Br. at 20 ("it is unclear whether the Washington Legislature could rewrite the law * * * to reach a different conclusion about preemption."). Washington does not have a right to evade treaty obligations. The law does not permit the state to abrogate the Yakama Nation's rights merely so that it might "pursu[e] the most efficient remedy" to enforce fuel taxes on Washington drivers. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). As both Petitioner and the Solicitor General point out, Washington has shifted its fuel tax before in response to court cases enforcing Tribal rights. The current regime reflects the deliberate choice of the Washington legislature.

Moreover, the Solicitor General's speculative concerns may soon become moot, as Washington contemplates abandoning its fuel tax altogether in favor of a Road Usage Charge. Washington's Constitution mandates that fuel taxes be exclusively used to maintain public highways and roads.[3] WASH. CONST. art. II § 40.

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[3] Section 40 of the Washington Constitution further reinforces the state supreme court's ruling. Because the Washington Constitution requires that fuel taxes such as those at issue can only be spent on maintaining roads, it is even clearer that this

Recognizing that motor vehicles are increasingly fuel efficient and that tens of thousands of electric vehicles do not pay for the privilege of using the public highways, Washington's legislature has authorized research on driving taxes that would be paid per mile.[4]

The naked concerns about potential revenue loss are speculative and unquantified. Even the Solicitor General frankly allows that it may be preferable to let "other state courts * * * interpret the relevant treaty language before this Court intervenes." Br. at 21.

CONCLUSION

The Washington Supreme Court's determination rests on a reasonable construction of the state statute and should be treated as conclusive. The proper construction of Washington state's fuel tax statute does not merit certiorari. This Court should deny the petition.

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fuel tax as applied to Cougar Den was an impermissible tax on its use of public highways. *Cree II*, 157 F.3d at 769 ("the Treaty clause must be interpreted to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use.").

[4] 2015 Wash. Sess. Laws 1720, 1726 § 205(1); Gutman, "Washington state to test pay-by-the-mile as a way to fund highways," Seattle Times (Sept. 15, 2017), found at: https://www.seattletimes.com/seattle-news/transportation/washington-state-to-test-pay-by-the-mile-as-a-way-to-fund-highways/

DATED this 29th day of May, 2018.

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In the Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

v.

COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Article III of the Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians, 12 Stat. 952-953, secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." The question presented is:

Whether Article III precludes application to Yakama tribal members of a tax imposed by the State of Washington on fuel purchased out-of-state and imported into Washington, as part of a comprehensive state scheme that also imposes the tax on fuel removed from an in-state terminal or refinery.

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In the Supreme Court of the United States

No. 16-1498

WASHINGTON STATE DEPARTMENT OF LICENSING, PETITIONER

v.

COUGAR DEN, INC.

ON WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

At issue in this case is the scope of a right guaranteed to the Yakama Indian Nation by a treaty entered into between the Yakamas and the United States. The United States has an interest in the proper interpretation of treaties between the federal government and Indian tribes, in light of both the United States' own interests as a party to such treaties and its special relationship with the Indian signatories whose rights are secured under such treaties. At the Court's invitation, the United States filed an amicus brief at the petition stage of this case.

STATEMENT

1. In the mid-nineteenth century, the United States entered into a series of treaties with Indian tribes in

what is now the State of Washington. *Tulee* v. *Washington*, 315 U.S. 681, 682-683 (1942). A group of Indians now known as the Yakama Indian Nation (the Tribe) agreed in one of those treaties to cede vast tracts of land within that territory to the United States, reserving for itself a much smaller reservation. *Ibid.* One of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region, including through the Tribe's reservation. *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1240-1241 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). To secure from the Tribe the concession that roads could be built through the reservation, the United States made certain representations regarding the Tribe's access to and use of public roads. Specifically, Article III of the Treaty provides:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Treaty of June 9, 1855, between the United States and the Yakama Nation of Indians (1855 Treaty), art. III, 12 Stat. 952-953.[1]

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[1] The United States has entered into treaties with tribes in Idaho and Montana that contain identically worded right-to-travel provisions. See Treaty of June 11, 1855, between the United States and the Nez Percé Indians, art. III, 12 Stat. 958; Treaty of July 16, 1855, between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, art. III, 12 Stat. 976.

2. a. The Washington state law at issue in this case requires suppliers, exporters, blenders, distributors, and (as relevant here) importers of motor-vehicle fuel to obtain a license and imposes a per-gallon motor-fuel tax on "licensees." Wash. Rev. Code Ann. §§ 82.36.010(12), 82.36.020, 82.36.080(1)(d) (West 2012), 82.38.020(12), 82.38.030, 82.38.090(1)(d) (West 2008).[2] The tax applies both to fuel originating in the State (for example, when a tanker truck is filled with fuel from a refinery or bulk storage facility) and to fuel brought into the State after being removed from a refinery or bulk storage facility outside of Washington. For fuel removed from an in-state refinery or terminal, the State imposes the tax at the time of removal (with certain exceptions not relevant here). *Id.* §§ 82.36.020(2)(a)-(b) (West 2012), 82.38.030(7)(a)-(b) (West 2008). For fuel that "enters into" Washington from another State, the tax is imposed upon entry. *Id.* §§ 82.36.020(2)(c) (West 2012), 82.38.030(7)(c) (West 2008).[3] Those who bring fuel into the State via a public highway must pay the same per-gallon tax as those who bring fuel into the State's stream

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[2] Citations are to the 2008 and 2012 Revised Code of Washington Annotated, which was in effect when the relevant conduct took place. The State has recodified the cited provisions without substantive change. See Pet. Br. 7 n.2.

[3] The tax does not apply immediately to fuel imported into the State by pipeline or vessel operated by a "licensee" and bound for a "terminal" or "refinery." Pet. App. 18a (Fairhurst, C.J., dissenting) (citing Wash. Rev. Code Ann. §§ 82.36.010(3), (4), (10), and 82.36.020(2)(c) (West 2012); *id.* §§ 82.38.020(4), (5), (12), and 82.38.030(7)(c) (West 2008)). The tax is triggered when fuel first brought in by one of those methods is later removed from the in-state terminal or refinery. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7)(a)-(c) (West 2008).

of commerce through other means. *Id.* §§ 82.36.020 (West 2012), 82.38.030 (West 2008).

b. The state motor-fuel tax currently in effect is not the first version of such a tax that the Washington Legislature has adopted. Before the current tax was enacted, a federal district court had determined that a previous version of the tax placed the incidence of the tax on fuel retailers (*i.e.*, gas stations). See *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005). That court had therefore held that the previous fuel-tax regime, as it pertained to Indian retailers operating on Indian lands, ran afoul of the rule that States generally may not tax Indian activities in Indian country absent congressional authorization. *Id.* at 1261-1262; see *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-459 (1995); *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 475-480 (1976).

Following that adverse judgment, the Washington Legislature crafted the current fuel tax, following guidance from this Court. In *Chickasaw Nation*, the Court held that a State could not apply its motor-fuel tax to fuel sold by a tribe to non-Indians in Indian country where the incidence of the tax was on the tribe (as a fuel retailer), but it noted that "if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. The Washington Legislature accordingly moved the incidence of its motor-fuel tax up the supply chain. With respect to fuel ultimately sold on an Indian reservation, the effect of that change is to impose the tax before the fuel arrives on the reservation. See Pet. Br. 6-7. The Washington Legislature's intent

and purpose, as set forth in the statute, is to impose a per-gallon tax on motor fuel "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

Putting to one side any effect the Yakama Treaty might have here, such a tax is lawful as applied to fuel to be delivered to Indian country. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 115 (2005) (holding that *Chickasaw Nation*'s bar on imposing a state excise tax on a tribe or tribal members for sales in Indian country did not apply to a state tax imposed on the off-reservation receipt of fuel by a non-Indian distributor who subsequently delivered the fuel to a tribally owned gas station on the reservation).

3. Respondent Cougar Den, Inc., is a business incorporated under Yakama Nation law. Its owner and president is an enrolled member of the Tribe. Pet. App. 2a. Beginning in 2013, respondent used public highways to transport fuel from Oregon to the Tribe's Reservation in Washington. *Ibid.* Respondent contracted with a trucking company, KAG West, to have the fuel transported over the Oregon-Washington border. *Ibid.*[4] Respondent sold more than 90% of its fuel to Yakama-owned retail gas stations on the Tribe's Reservation, which in turn sold the fuel to customers. *Id.* at 50a-51a. Respondent did not obtain a fuel-importer license or pay the Washington motor-fuel tax when either it or KAG West brought fuel into Washington. *Id.* at 2a. In

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[4] Under the Washington statute, where an entity importing fuel into the State is acting as an agent, "the person for whom the agent is acting is the importer." Wash. Rev. Code Ann. § 82.36.010(16) (West 2012).

December 2013, petitioner, the Washington State Department of Licensing (the Department), issued an assessment against respondent, demanding payment of $3.6 million in unpaid taxes, penalties, and licensing fees. *Ibid.*

Respondent appealed the assessment to an administrative law judge in the Department, who held that the assessment violated the provision in Article III of the 1855 Treaty that secures to the Yakamas the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953; see Pet. App. 2a-3a. The Department's Director overturned the administrative law judge's order. Pet. App. 44a-61a. The Director reasoned that Article III of the 1855 Treaty did not exempt respondent from paying the state motor-fuel tax because respondent "is not being taxed for using public highways"; rather, respondent "is being taxed for importing fuel." *Id.* at 58a. The Director concluded that respondent "needs a Washington fuel importer license to bring fuel into this state." *Ibid.*

4. Respondent petitioned for review in Yakima County Superior Court, and the court set aside the Director's order. Pet. App. 30a-43a. The court concluded that respondent's transport of fuel into Washington "falls within its [r]ight to [t]ravel" under Article III of the 1855 Treaty, and that because the Washington tax "places a restriction on the [r]ight to [t]ravel," the "taxes, penalties, interest, and licensing requirements" imposed by the state law "are preempted and barred by the Treaty." *Id.* at 34a.

5. The Washington Supreme Court granted direct review and affirmed. Pet. App. 1a-29a.

a. The Washington Supreme Court rejected petitioner's contention that Article III of the 1855 Treaty

permits the State to restrict or regulate a good that is incidentally brought over a highway. Pet. App. 6a. The court concluded that petitioner's interpretation of Article III "ignores the historical significance of travel to the Yakama Indians" and the established rule of treaty interpretation that "Indian treaties must be interpreted as the Indians would have understood them." *Id.* at 5a-6a (citing *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970)). The court observed that when the Treaty was signed, the Tribe "exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes," and it concluded that the Treaty was intended to preserve the Tribe's ability to travel on the public highways to engage in trade. *Id.* at 7a-8a. In the court's view, the Treaty accordingly secures to the Tribe and its members a right to travel on highways without state regulation. *Ibid.* The state motor-fuel tax interfered with that right, the court reasoned, because it taxed the "importation of fuel, which is the transportation of fuel." *Id.* at 16a. The court further reasoned that the Treaty also secures a right to conduct "any trade, traveling, and importation," without complying with state regulation, so long as the Tribe "requires the use of public roads" in carrying out that activity. *Ibid.* For that reason, and because, according to the court, it would be "impossible" for respondent to import motor-fuel to the Yakama Reservation without using the public highways, the court held that the State could not impose its motor-fuel excise tax on respondent. *Id.* at 13a-14a, 16a.

The Washington Supreme Court found support for its conclusion in cases in which the Ninth Circuit had ruled that two Washington laws could not be enforced

against members of the Tribe: a law that imposed license and overweight-truck permit fees on persons who hauled logs from the Tribe's Reservation to off-reservation mills (see *Cree*, 157 F.3d at 765); and a law that required individuals other than licensed wholesalers to give notice to the state liquor control board before transporting "unstamped" cigarettes within the State (see *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007)). Pet. App. 9a-11a.

The Washington Supreme Court distinguished the Ninth Circuit's decision in *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), in which a business owned by an enrolled member of the Tribe claimed an exemption based on Article III of the 1855 Treaty from a Washington statute that required the business to place money into escrow to reimburse the State for health-care costs related to the use of tobacco products. Pet. App. 12a-13a. The tribal business manufactured its products by shipping its tobacco crop to Tennessee and North Carolina for mixing and processing and then, after returning the processed tobacco to the Reservation, sold its products throughout Washington and other States. 768 F.3d at 991. In *King Mountain*, the Ninth Circuit concluded that the business was not exempt from making the escrow payments because the Treaty secured to the Tribe the right "to travel upon all public highways," not the "right to trade." *Id.* at 997-998. According to the Washington Supreme Court, *King Mountain* stands for the proposition that "[w]here trade does not involve travel on public highways, the right to travel provision in the treaty is not implicated." Pet. App. 13a. But here, the court concluded, "travel on public highways is directly at issue because the tax was an importation tax," and it

"was impossible for [respondent] to import fuel without using the highway." *Id.* at 13a-14a; see *id.* at 16a.

b. Chief Justice Fairhurst, joined by Justice Wiggins, dissented. Pet. App. 17a-29a. She explained that the Tribe's "right to travel" protected by the treaty "is not a right to trade," and the motor-fuel tax could therefore be applied to members of the Tribe because the tax "burdens trade[,] * * * not fuel transport." *Id.* at 17a. In her view, the Washington Legislature's clear intent was "to levy an excise tax on the first instance of wholesale possession of fuel not distributed through a refinery or importation terminal within the state," and that "[w]hether that fuel is then brought to market within Washington is not necessary or relevant for purposes of assessing tax due." *Id.* at 18a-19a (emphasis omitted); see p. 3 n.3, *supra*.

Chief Justice Fairhurst further concluded that the treaty right "applies to trade only if inextricably linked to travel," which is not true of the motor-fuel tax. Pet. App. 25a; see *id.* at 23a. She explained that in *King Mountain*, the escrow payments required by state law "had nothing to do with travel, other than to impose a financial burden on the products King Mountain sought to bring to market in Washington." *Id.* at 26a. "Similarly," she continued, "Washington's fuel excise tax on importers, imposed on the first incidence of wholesale possession of fuel within Washington, has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Ibid.* Chief Justice Fairhurst acknowledged that in *King Mountain* and in this case, "travel is necessary for trade" and that "[w]ithout travel, most goods have no market." *Ibid.* But she concluded that

"necessity of transport, without an inextricable link between travel and trade, is not sufficient for preemption." *Ibid.*

SUMMARY OF ARGUMENT

The Washington Supreme Court erred in concluding that Article III of the 1855 Treaty exempts respondent from paying Washington's motor-fuel tax.

A. Indian tribal members going beyond reservation boundaries, like respondent in this case, are generally subject to non-discriminatory state laws. State laws may not, however, infringe on any right secured in an Indian treaty for the tribe and its members to engage in specific activities outside the reservation.

Article III secures to the Yakama Indians the "right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953. Whatever the precise scope of that right with regard to restrictions on or taxation of highway use, the right, by its plain terms, does not protect activities other than travel, such as the possession of goods to be used in trade. And the available historical evidence does not demonstrate that Article III was intended to extend to activities other than what is expressly stated in the text.

B. Washington's motor-fuel tax falls outside of Article III's ambit because it is not directed at travel on public highways, but instead the first possession of fuel by a licensee in the State. To be sure, sometimes the first possession occurs on public highways, if licensees bring fuel into Washington by truck. But the State taxes the first possession of fuel regardless of whether that possession occurs on a highway when the fuel is brought over the border; via some other method of transporting fuel into the State; or at an in-state refinery or terminal. Nothing about a licensee's liability for

the tax turns on the licensee's decision to use highways in the course of its business.

The history of the motor-fuel tax further demonstrates that the Washington Legislature was targeting first possession, rather than the use of the highways. The Legislature adopted the current version of the tax after a federal court struck down an earlier version, which the court determined had placed the incidence of the tax on on-reservation Indian fuel retailers. Consistent with guidance from this Court, the Legislature revised the tax by shifting the incidence of the tax up the chain to the first moment that a licensee possesses motor fuel in the State, before delivering it to an on-reservation entity.

C. The Washington Supreme Court erred in holding that Article III of the 1855 Treaty nevertheless barred the State from collecting its motor-fuel tax from respondent. Notwithstanding the text of Article III and the context and history of Washington's motor-fuel tax, the court determined that the tax imposed an impermissible burden on public-highway travel. In so concluding, the court focused on the fact that the events giving rise to tax liability will, for some licensees, take place on a public highway. But the operative question in evaluating a state tax is what activity the tax targets, not where a taxed entity chooses to undertake that activity.

Washington's motor-fuel tax does not depend upon the use of the highways, even if respondent happened to be using a highway when the tax was triggered. The Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn into a tanker truck and then transported to the

Reservation on public highways. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack in Oregon and brings it into Washington by truck.

The decision below is not supported by the Ninth Circuit decisions upon which the court relied. Washington's motor-fuel tax is distinguishable from the state laws at issue in those cases, which required a tribal member to comply with certain requirements in connection with the use of the public highways to transport its goods for trade, or required tribal businesses to notify the State before transporting certain goods on the highways. Even assuming those decisions were correct, Washington's motor-fuel tax does not impose requirements on the Tribe's highway use, but rather imposes a per-gallon tax on the possession of a good in commerce. Respondent would thus be subject to Washington's motor-fuel tax even under the Ninth Circuit's framework for interpreting the Treaty right.

ARGUMENT

ARTICLE III OF THE 1855 TREATY DOES NOT EXEMPT RESPONDENT FROM PAYING WASHINGTON'S MOTOR-FUEL TAX

The "right, in common with citizens of the United States, to travel upon all public highways" protected by the 1855 Treaty, art. III, 12 Stat. 952-953, is not violated by the tax at issue here, which taxes the introduction of a good into the state stream of commerce, no matter where the good originates or how it enters the State. Washington's motor-fuel tax is a tax on the first possession of fuel within the State, which always occurs outside the boundaries of the Tribe's Reservation and is thus subject to state taxation. The Washington Su-

preme Court erred in concluding that Article III exempts respondent from paying Washington's motor-fuel tax.

A. Article III Of The 1855 Treaty Secures The Right Of The Tribe And Its Members To Free Access From The Reservation To Public Highways And To Travel Upon The Public Highways

1. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). If a federal treaty recognizes in the Indians a right to engage in certain activities outside the reservation, however, such rights "may . . . not be qualified by the State." *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975) (quoting *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, 398 (1968)). Here, the State of Washington has imposed a tax on motor fuel that is triggered at the time fuel enters into Washington (or when fuel is removed from an in-state terminal or refinery), which occurs outside of the Tribe's Reservation. See *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005). Accordingly, respondent is subject to the tax unless Article III of the 1855 Treaty exempts members of the Tribe from complying with the state law.

In determining the scope of an Indian treaty right, courts must construe the language of a treaty "in the sense in which [it] would naturally be understood by the Indians" at the time the treaty was negotiated, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (*Fishing Vessel*) (citation omitted), looking "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and

the practical construction adopted by the parties.'" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)); see *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942); *United States* v. *Winans*, 198 U.S. 371, 380-381 (1905). Doubtful or ambiguous expressions are to be "resolved in the Indians' favor." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970). Courts may not, however, ignore "clear * * * limit[s]" appearing in the treaty. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995).

2. Applying those principles, Article III of the 1855 Treaty, as relevant here, secures for the Tribe only a right to travel upon the public highways in common with others, not a more general and preferential right to engage in trade using the highways free of state regulation or taxation.

a. Article III secures to the Yakamas a "right of way, with free access from the [Reservation] to the nearest public highway," and "also the right, in common with citizens of the United States, to travel upon all public highways." 1855 Treaty, art. III, 12 Stat. 952-953. Whatever the precise preemptive scope of the latter clause with regard to regulation and taxation of highway use as such, see pp. 27-29, *infra*, that provision of Article III, by its plain text, recognizes only a right of tribal members to travel upon public highways in common with others. It does not confer any right to possess goods that may incidentally be transported on the highways, or to do so free of state regulation or taxation. The court should respect that limit on the rights appearing in the Treaty's text. See *Chickasaw Nation*, 515 U.S. at 465-466 (stating that "treaties should be construed

liberally in favor of * * * Indians," but concluding that tools of construction could not overcome a "clear geographic limit" in the treaty's text) (citation omitted).

The Ninth Circuit—the federal circuit that encompasses the Tribe's reservation and ceded lands (and the only federal court of appeals to have addressed the Treaty right)—has recognized that the text of Article III is limited to protecting a right to travel upon public highways and that the Treaty right does not preempt state regulation of the trade of goods that involves highway travel. In *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989 (2014), cert. denied, 135 S. Ct. 1542 (2015), the Ninth Circuit held that Article III of the 1855 Treaty did not exempt members of the Tribe from complying with a state law that required cigarette companies to place money into an escrow account for every qualifying unit of tobacco sold subject to the State's cigarette tax, in order to reimburse the State for public-health expenses related to the use of tobacco products. *Id.* at 990-992.

The court of appeals in *King Mountain* rejected the Tribe's argument that Article III of the 1855 Treaty "prohibit[s] imposition of economic restrictions or preconditions on the Yakama people's Treaty right to engage in the trade of tobacco products." 768 F.3d at 997. The tribal business in that case shipped its tobacco crop to Tennessee and North Carolina for processing, and the finished product was then shipped back to the reservation, where it was taken to market throughout Washington and other States. *Id.* at 991. The court explained that while the Treaty secures for the Tribe a "right to *travel* * * * for the purpose of transporting goods to market" without state interference, it does not secure any right to *trade* beyond the right, in common

with others, to transport goods on the highways. *Id.* at 998 (emphasis added). The court analyzed the Washington escrow statute and determined that it was not a burden or tax on transportation as such, but rather a generally applicable provision focusing on a subject distinct from transportation that required cigarette companies to place money in escrow for each unit of tobacco sold. *Id.* at 991-992. The court held that Article III did not exempt Yakama members from complying with the escrow law, and it based that conclusion on "the plain text of Article III," which, it stated, "reserve[s] to the Yakama the right 'to travel upon all public highways,'" but does not discuss trade. *Id.* at 997 (quoting 1855 Treaty, art. III, 12 Stat. 952-953).

b. Moreover, although courts must look "beyond the written words to the larger context that frames [an Indian] [t]reaty" and construe a treaty's language in the way it would have been understood by the Indians, *Mille Lacs*, 526 U.S. at 196; *Fishing Vessel*, 443 U.S. at 676, the available historical materials do not demonstrate that the Tribe would have understood Article III of the 1855 Treaty to extend to activities other than what is expressly stated in the text.

In this case, the Washington courts adopted findings of fact and conclusions of law regarding the historic understanding of the Treaty right made by a federal district court in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229, 1236-1246 (E.D. Wash. 1997), aff'd *sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998). See Pet. App. 31a-35a (Yakima County Superior Court's findings of fact and conclusions of law); *id.* at 5a-7a & n.3; see also *Cree*, 157 F.3d at 769, 773 (Ninth Circuit concluding that district court's factual findings in *Yakima Indian Nation* were not clearly erroneous). The

historical materials show that travel in pursuance of trade was crucial to the Yakamas' historic way of life, see *Yakama Indian Nation*, 955 F. Supp. at 1238-1239, and that travel was "particularly important for the purpose of trade" because the Yakamas "were a central part" of a tribal trading network "due to their location between Northwest Coast tribes to the west and the Plains tribes to the east," *id.* at 1238. The materials likewise show that representatives of the United States repeatedly indicated during talks that the Yakamas' ability to travel in order to pursue trade would be preserved by the Treaty. They represented, for example, that the Yakamas would "be allowed to go on the roads to take [their] things to market, [their] horses and cattle"; that they would "be permitted to travel the roads outside the reservation"; and that they would have "the privilege of traveling over roads." *Id.* at 1243-1244 (citations and emphasis omitted).

The historical record does not show, however, that the Yakamas understood the Treaty to confer a right to trade goods outside the reservation free from generally applicable regulation and taxation—only the right to use the public highways in common with others to engage in such trading endeavors. *Yakama Indian Nation*, 955 F. Supp. at 1253. The historical record therefore fully aligns with the limited terms of the Treaty's text. As the Ninth Circuit observed in *King Mountain*, "there is no right to trade in the [1855] Treaty," and the Indian canon of construction "'does not permit reliance on ambiguities that do not exist.'" 768 F.3d at 998 (quoting *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)); see *ibid.* (Indian canon was inapplicable because "the Treaty's meaning to the Yakama

people cannot overcome the plain and unambiguous text of the Treaty," which provides only a right to travel).

B. Washington's Motor-Fuel Tax Does Not Infringe On Tribal Members' Right To Travel Upon The Public Highways

Washington's motor-fuel tax does not infringe on the right under Article III of the 1855 Treaty of tribal members to travel on public highways in common with others. Rather, it is a tax on the possession of goods in Washington outside the Tribe's Reservation, which falls within the State's taxing authority and is imposed on respondent in common with others who undertake the first possession of motor fuel in the State, whether that first possession occurs on a public highway or elsewhere. Because Article III of the 1855 Treaty recognizes only a right to travel on public highways, the Treaty does not exempt respondent from paying Washington's motor-fuel tax.

1. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). Reading Washington's motor-fuel tax as a whole demonstrates that it is not a tax upon highway travel, at least for purposes of assessing its validity under Article III of the Treaty. To the contrary, fuel licensees must pay the tax regardless of whether they remove fuel from an in-state terminal or refinery or import fuel into the State—and, if they import (and the fuel is not bound for an in-state terminal or refinery, see p.3 n.3, *supra*), regardless of what means of transport they use. Wash.

Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7)(a)-(c) (West 2008).

Imposition of the tax, in other words, does not depend on a taxpayer's use of the highways. The tax is assessed per gallon of fuel, at a set rate, without regard to how the fuel enters the state stream of commerce. Wash. Rev. Code Ann. §§ 82.36.020(1), 82.36.025 (West 2012), 82.38.030 (West 2008); cf. *Interstate Transit, Inc.* v. *Lindsey*, 283 U.S. 183, 190 (1931) (state tax imposed on bus operator was a tax on doing business in the State that violated the dormant Commerce Clause, rather than a tax on the use of state roads, where tax liability did not "rise with an increase in mileage travelled, or even with the number of passengers actually carried * * * [n]or [wa]s it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights"). Imposition of the motor-fuel tax and the amount of tax liability do not turn on the licensee's use of the highways.

Washington's motor-fuel tax thus is a general assessment of the same type as the escrow requirement in *King Mountain*. Like the escrow requirement, which was imposed on each qualifying unit of tobacco sold, Washington's motor-fuel tax is imposed on each gallon of fuel entering the state stream of commerce, irrespective of whether and how it is transported into the State. The tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." Pet. App. 26a (Fairhurst, C.J., dissenting). The tax therefore is appropriately viewed as an excise tax on the first instance of possession of fuel within Washington, see *id.* at 17a, not as a tax or burden on the right to travel on public

highways in common with others within the meaning of Article III.

The fact that the first possession for some regulated parties will occur on a highway does not convert an excise tax on that possession into a tax on the use of the highway—or a burden on the "right, in common with citizens of the United States, to travel upon all public highways," 1855 Treaty, art. III, 12 Stat. 952-953—any more than a state law banning the possession of a certain product would be a ban on highway travel simply because the ban encompasses the situation in which the person has brought the product in from out of state via a highway. In both the hypothetical and the present case, the highway is only relevant because someone has chosen it as the setting for undertaking an act (here, possession of fuel) that is subject to a general regulation or financial assessment, wherever the act takes place.

2. The history of Washington's motor-fuel tax further demonstrates that it is designed as an excise tax on the fuel itself, not as a tax on highway travel. Before the Washington Legislature enacted the current version of the fuel tax, a federal district court had concluded that a previous version of the tax had placed the incidence on fuel retailers. That posed an obstacle with respect to taxation of on-reservation Indian retailers due to the established rule that States generally may not tax Indian activities in Indian country. *Squaxin Island Tribe* v. *Stephens*, 400 F. Supp. 2d 1250, 1262 (W.D. Wash. 2005); see Pet. 5; Pet. App. 20a-22a.

In *Oklahoma Tax Commission* v. *Chickasaw Nation*, *supra*, this Court held that although a State cannot impose a tax on fuel sold by a tribe in Indian country, "the State generally is free to amend its law to shift the tax's legal incidence." 515 U.S. at 460. Following that

guidance, the Washington Legislature amended the previous version of the motor-fuel tax by shifting its legal incidence up the supply chain, such that the fuel is taxed before it arrives on an Indian reservation. *Ibid.*; Pet. 5-6. The statute itself explains that the Legislature's purpose was to impose the motor-fuel tax "at the time and place of the first taxable event and upon the first taxable person within th[e] state." Wash. Rev. Code Ann. §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

The Washington tax therefore operates in the same way as the Kansas tax upheld by this Court in *Wagnon*, which was imposed on fuel distributors upon "their initial receipt of motor fuel," where the distributors were permitted but not required to pass the tax down the distribution chain to retailers, including retailers on an Indian reservation. 546 U.S. at 99-100. That the State now taxes fuel when it is first possessed by a distributor in the State—whether when removed from a refinery or terminal rack at a bulk storage facility in the State, or brought in from out of State—thus reflects the State's effort to ensure that the incidence of the tax is not on Indian retailers operating on Indian reservations. It does not reflect an effort to impose any conditions or restrictions on using the public highways. And it does not interfere with the Treaty right to use the public highways in common with others for trading and other endeavors. Article III therefore does not exempt respondent from paying Washington's motor-fuel tax on fuel that it imports from Oregon using a public highway.

C. The Washington Supreme Court Erred In Holding That Article III Of The 1855 Treaty Exempts Respondent From Paying Washington's Motor-Fuel Tax

1. The Washington Supreme Court concluded that the state motor-fuel tax is a tax on the use of public highways because it "taxes the importation of fuel, which is the transportation of fuel." Pet. App. 16a. The court therefore held that the tax could not be enforced against respondent in light of Article III of the 1855 Treaty. *Ibid.* In characterizing the tax as one targeting highway travel, the court focused on the fact that, in respondent's case, the tax was triggered when respondent moved fuel across the state line inside a tanker truck. *Id.* at 13a-14a. The court recognized that the tax would be assessed "regardless of whether [respondent] uses the highway." *Ibid.* But the court considered that feature "immaterial" because "in this case, it was impossible for [respondent] to import fuel without using the highway." *Id.* at 14a. That analysis of the state fuel tax for purposes of Article III does not withstand scrutiny.

Characterizing a tax—especially for purposes of determining its validity under the 1855 Treaty—based on only one of the types of events that trigger its application improperly severs that trigger from the larger statutory context. Cf. *Brown & Williamson*, 529 U.S. at 133 (courts must "interpret [a] statute 'as a symmetrical and coherent regulatory scheme'") (citation omitted); *Utility Air Reg. Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014) ("[R]easonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'") (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Read as a whole, Washington's motor-fuel tax does not depend upon use of the highways, even

if respondent happened to be using a highway at the time application of the tax to respondent was triggered.

As discussed above (pp. 20-21, *supra*), Washington's revised statutory regime taxes the first possession of fuel in the State, regardless of how or where that possession occurs. Wash. Rev. Code Ann. §§ 82.36.020(2)(a)-(c) (West 2012), 82.38.030(7) (West 2008). The Washington Supreme Court did not appear to dispute that the Treaty would not bar application of the tax to respondent if it obtained the motor fuel from a refinery or terminal rack within the State, even if the fuel was withdrawn from the refinery or terminal rack into a tanker truck and respondent then used the truck to transport the fuel over public highways to the Tribe's reservation. There is no reason for a different result if respondent obtains the fuel from a refinery or terminal rack outside the State and brings it into the State by truck. That respondent allegedly *must* use the highways to import motor fuel, see Pet. App. 16a, does not alter the analysis. Because respondent's decision to obtain fuel out of state rather than within has no bearing on its liability for the state tax, the fact that respondent happens to be dependent on the highways to bring fuel into Washington from out of state is immaterial to the question whether Washington's tax is preempted by the Treaty.

Moreover, to construe Article III to confer a right on tribal members to avoid excise taxes on the possession of goods that are transported by highway could have an impact beyond the State of Washington. Petitioner states that respondent has obtained fuel exporter licenses in other States. Pet. Br. 40. If the Washington Supreme Court's decision is affirmed, respondent could claim a right to ship fuel from those States all over the United States and avoid paying similar fuel-import

taxes in States to which it transports fuel by highway. Pet. App. 27a-28a (Fairhurst, C.J., dissenting).

2. The Washington Supreme Court further erred in concluding that the historic evidence of the parties' understanding of the Treaty right supported a reading of Article III that would encompass a right to be free of state taxation when engaging in activities, including trade, that make incidental use of the highways. Pet. App. 6a-8a. The court grounded its reasoning in two decisions of the Ninth Circuit, in which members of the Tribe had invoked Article III to claim an exemption from paying the fees and complying with the licensing requirements contained in other Washington statutes. See *Cree*, 157 F.3d at 765; *United States* v. *Smiskin*, 487 F.3d 1260, 1264 (2007). Those decisions, even assuming they were correct (but see pp. 27-29, *infra*), do not support the Washington Supreme Court's conclusion that Article III exempts respondent from paying Washington's motor-fuel tax. The Ninth Circuit has interpreted Article III to provide certain rights for members of the Tribe to travel on public highways free from state taxation or other measures (except for non-revenue-raising regulations that are needed to safeguard public safety), but Washington's motor-fuel tax does not operate in the same way as the restrictions imposed by Washington in those cases.

a. In *Cree*, *supra*, the Ninth Circuit considered whether members of the Tribe were exempt from Washington laws that required registration and licensing of logging trucks along with payment of fees according to gross weight, as well as log-tolerance permits and an associated fee for overweight trucks. 157 F.3d at 765. The Tribe and some of its members brought a suit for declaratory and injunctive relief after state officials

issued traffic citations to drivers employed by tribal logging businesses that had refused to obtain the necessary licenses or permits. *Ibid.* The Tribe contended that Article III recognized a right in its members to haul timber from the reservation to off-reservation markets without restriction and that the State therefore could not impose licensing fees or permit requirements on logging trucks owned by the Tribe or its members. *Ibid.*

To determine how Article III would have been understood by the Indians when the Treaty was adopted, the district court conducted an extensive inquiry into the Treaty's history. See pp. 16-17, *supra*; *Yakama Indian Nation*, 955 F. Supp. at 1236-1246. The court observed that at the time the Treaty was negotiated, tribal members traveled extensively for the purpose of trade. 955 F. Supp. at 1238. Based on the language of the Treaty, the importance of travel to the Tribe, and representations made by federal negotiators, the court concluded that tribal members would have understood Article III to secure a right to use public highways for transporting logs from the Reservation to market without limitations such as fees. *Id.* at 1246-1249. The court held, however, that the Tribe and its members must comply with state registration requirements for purposes of identification, to the extent the requirements did not impose a fee or surcharge on the Treaty right. *Id.* at 1260.

The Ninth Circuit affirmed, holding that the 1855 Treaty exempted tribal logging companies from compliance with state licensing and permitting requirements, and payment of associated fees, for trucks hauling logs from the Reservation on public highways. *Cree*, 157 F.3d at 769. The court determined that Article III, read as

the Tribe would have understood it, secured for the Tribe and its members "the right to transport goods to market over public highways without payment of fees for that use." *Ibid.*

b. In the other Ninth Circuit case relied upon by the Washington Supreme Court, *Smiskin*, *supra*, the United States charged two Yakama members with violating the federal Contraband Cigarette Trafficking Act, 18 U.S.C. 2342(a), which makes it "unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes," and incorporates state law to define what is contraband. See 487 F.3d at 1263. The basis for the prosecution was that the defendants had failed to comply with a Washington state law that required persons other than licensed wholesalers to give notice to state officials before transporting "unstamped" cigarettes—*i.e.*, cigarettes without either a "tax paid" or "tax exempt" stamp affixed to the packaging—within the State. *Ibid.* The federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) had seized 4205 cartons of unstamped cigarettes from a defendant's residence because ATF agents suspected the defendants were transporting unstamped cigarettes from smoke shops on an Idaho Indian reservation to smoke shops on various Indian reservations in Washington. *Ibid.* The Ninth Circuit held that the defendants' violation of Washington's pre-notification requirement could not provide a valid basis for a federal prosecution under Section 2342(a) because applying that requirement to tribal members violated Article III of the 1855 Treaty. *Id.* at 1264.

The Ninth Circuit again took as its interpretive baseline this Court's rule that "[t]he text of a treaty must be

construed as the Indians would naturally have understood it at the time of the treaty." *Smiskin*, 487 F.3d at 1264 (citing *Mille Lacs*, 526 U.S. at 196, 200). Based on the history of the Treaty described by the district court in *Yakama Indian Nation*, *supra*, the court of appeals concluded that the pre-notification requirement was a restriction and condition on the right to travel that violated Article III. *Smiskin*, 487 F.3d at 1266. The court saw no distinction between a fee that applied to highway travel and a pre-notification requirement insofar as the Treaty right was concerned. *Ibid.* Applying either to Yakama tribal members engaged in public-highway travel, the Ninth Circuit reasoned, "imposes a condition on travel that violates their treaty right to transport goods to market without restriction." *Ibid.*

In the view of the United States, the Ninth Circuit erred in concluding that the pre-notification requirement at issue in *Smiskin* was a restriction on the right to travel on public highways barred by Article III. The purpose and effect of Washington's pre-notification requirement was to enforce (prevent evasion of) the collection of the State's tax on cigarettes. Such a tax may be validly applied to on-reservation sales of cigarettes to non-Indians, even by a tribe or its members, where the incidence of the tax is on the non-Indian purchaser. See, *e.g.*, *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154-157 (1980). The pre-notification requirement imposed by Washington law was not directed to the use of public highways as such; it imposed only a modest regulatory requirement as part of a comprehensive cigarette-tax regime. And because the Tribe and its members were not exempt from enforcement of the State's overall cigarette-tax re-

gime, there is no reason to conclude that Article III exempted the Tribe from that one feature, to which travel was merely incidental.

c. To resolve this case, the Court need not decide the extent, if any, to which the Ninth Circuit is correct in its underlying premise that Article III of the 1855 Treaty preempts certain state fees or other regulation of highway travel itself.[5] We do note, however, that Article III secures to the Yakamas only "the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. 952-953. That language does not on its face confer any right greater than what other citizens share or suggest that the Yakamas are exempt from generally applicable regulations or financial assessments related to use of the highways in Washington (much less elsewhere), such as tolls or regulation or taxation of trucks based on size. It is thus instructive in this regard that the first paragraph of Article III of the

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[5] The United States has argued in a brief in opposition to a certiorari petition that Article III of the 1855 Treaty does not preempt certain federal fees and taxes on trucks that use the highways and diesel fuel used by those trucks. See U.S. Br. in Opp. at 6-10, *Ramsey* v. *United States*, No. 02-1547 (June 26, 2003). The issue in *Ramsey* was not, as here, the extent to which the Treaty preempts *state* regulation, but rather the extent to which the Treaty exempts the Tribe from a general, nationwide tax and fee enacted by Congress. See 302 F.3d 1074, 1078 (9th Cir. 2002), cert. denied, 540 U.S. 812 (2003). The Ninth Circuit uses a different framework to determine whether Indian treaties create an exemption from federal taxes, looking to whether the treaty contains "express exemptive language." *Ibid.*; see *United States* v. *King Mountain Tobacco Co., Inc.*, No. 14-36055 (9th Cir. Aug. 13, 2018), slip op. 12 n.4. The United States argued in *Ramsey* that the text of Article III did not contain such express exemptive language regarding the federal taxes at issue. U.S. Br. in Opp. at 5-15, *Ramsey*, *supra* (No. 02-1547).

1855 Treaty provides two different rights to the Yakamas. The first is a special "right of way, with *free access* from [the Reservation] to the nearest public highway"; the second is a "right, in common with the citizens of the United States, to travel upon all public highways." *Ibid.* (emphasis added). The Yakamas' special right of "free access" to highways is guaranteed only between the Reservation and the nearest public highways. That phrase does not, however, modify the right to travel upon public highways, which is granted only "in common with citizens of the United States." *Ibid.*[6]

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[6] The phrase "in common with" also appears in the second paragraph of Article III of the 1855 Treaty, which "secure[s] to [the Yakamas] * * * the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." 12 Stat. 953. The Court has interpreted that provision to grant the Yakamas a right broader than simply "access to fishing sites 'in common with'" non-Indians, to include the "right to harvest a share of the runs of anadromous fish" at their usual fisheries. *Fishing Vessel*, 443 U.S. at 675. The Court reached that conclusion, however, "[b]ecause the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters" and thus would be unlikely to view the Treaty right "as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters." *Id.* at 678-679. The Court also determined, in light of apportionment standards rooted in the "Anglo-American common law," that the tribes should be permitted to take up to a 50% share of the first harvest. *Id.* at 685-686 & n.27.

But unlike the fisheries, which were a pre-existing resource from which Indians were taking fish at "usual and accustomed places" at the time of the 1855 Treaty, 12 Stat. 953, the public highways discussed in paragraph one of Article III were not natural resources, were not yet in place, and were to be built and maintained by non-Indian authorities. See *Yakima Indian Nation*, 955 F. Supp. at 1244 (discussing construction of roads). There accordingly is reason to doubt that the "in common with" language in the first paragraph of Article III gives the Yakamas a preferential right to use

However that may be, the motor-fuel tax at issue in this case is distinguishable from the state laws that the Ninth Circuit determined could not be applied to members of the Tribe in *Cree* and *Smiskin*. The Washington motor-fuel tax is thus not preempted even under the Ninth Circuit's framework for interpreting the Treaty right.

The state laws in *Cree* and *Smiskin* required tribal members to comply with certain requirements in connection with use of the public highways to transport their goods for trade. Tribal members were required to obtain licenses and permits and to pay fees as a precondition to operating logging trucks on the highways, see *Cree*, 157 F.3d at 765, or to pre-notify state officials when transporting unstamped cigarettes on the highways, see *Smiskin*, 487 F.3d at 1262. Washington's motor-fuel tax, by contrast, is levied on each gallon of fuel withdrawn from a refinery or terminal rack in the State or brought into the State, regardless of how the fuel is imported. Wash. Rev. Code Ann. § 82.36.020(1) (West 2012). That the tax is imposed by reference to the moment when motor fuel enters the state stream of commerce does not transform the tax into an impermissible burden on the use of the highways. To the contrary, for fuel that is imported, the tax is imposed when the fuel enters the State because the Legislature wanted to make clear that the tax was being imposed at the first moment of possession of motor fuel in Washington. *Id.* §§ 82.36.022 (West 2012), 82.38.031 (West 2008).

In the Washington Supreme Court's view, Washington's motor-fuel tax is indistinguishable from the pre-notification requirement in *Smiskin* because "[i]n both

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the highways free of state regulation and assessments for their construction, maintenance, and safe use.

cases, the State placed a condition on travel that affected the Yakamas' treaty right to transport goods to market." Pet. App. 13a. The motor-fuel tax, however, is not a "condition on travel." *Ibid.* It is an excise tax imposed by the gallon on the possession of fuel. The tax "has nothing to do with travel, other than to impose a financial burden on the products fuel importers seek to bring to market in Washington." *Id.* at 26a (Fairhurst, C.J., dissenting).

That was also true of the escrow requirement in *King Mountain*, which the Ninth Circuit concluded was not preempted by the Tribe's right to use the public highways. The Washington Supreme Court distinguished that case on the ground that "in *King Mountain*, travel was not at issue." Pet. App. 13a. But that reading of *King Mountain* is misconceived. The Tribe made *King Mountain* about travel by invoking Article III to claim an exemption from the escrow requirement for goods that tribal businesses brought to market in Washington. 768 F.3d at 991, 997-998. That escrow requirement imposed a financial burden on the Tribe's trading endeavors—unrelated to highway use—in the same way as the motor-fuel tax in this case. The court's effort to distinguish *King Mountain* is unpersuasive.

The 1855 Treaty reserves only a right for the Tribe to use the public highways. It does not exempt tribal members from taxation of goods that they transport by highway while conducting business outside the Tribe's Reservation. Respondent is therefore not exempt from the state motor-fuel tax.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted.

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No. 16-1498

In The Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,
A YAKAMA NATION CORPORATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION IN SUPPORT OF RESPONDENT

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10 Stat. 172, 32 Cong. Ch. 90 (Mar. 2, 1853) (Washington Territory Established) (AN ACT to establish the Territorial Government of Washington) 18

OTHER SOURCES

A.J. Splawn, *Ka-mi-akin, the last hero of the Yakimas* (1917) 21

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Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (1990) 8

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Report of A.J. Bolon to His Excellency Isaac I. Stevens, Governor and Superintendent of Indian Affairs, Washington Territory, September 30, 1854, records of the Washington Superintendent of Indian Affairs 1853-1874 19

Record of the official proceedings at the Council, held at the Council Ground in the Walla Walla Valley, with the Yakama Nation of Indians, and which resulted in the conclusion of a Treaty on the 9th day of June 1855 ..... 21, 31, 36

INTEREST OF *AMICUS CURIAE*[1]

The Confederated Tribes and Bands of the Yakama Nation is a sovereign, federally recognized Native Nation and signatory to the Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859) [hereinafter "Yakama Treaty"]. This dispute directly implicates the Yakama Treaty, as supported by the Treaty's historical context and the official minutes of the Treaty negotiations. The Yakama Treaty and the Treaty Minutes are set forth in full at App. A 1-14 and at App. B 15-117. At issue here is Article III, paragraph 1 of the Yakama Treaty:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, **is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways**.

12 Stat. at 952-953, App. A 6 (emphasis added). This is a right reserved to the Yakama Nation. As an exercise of our inherent sovereignty, we regulate our Members' and Yakama Nation licensed businesses' exercise of this Treaty-reserved right to travel and trade. Our

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[1] *Amicus curiae* represents that no counsel for any party authorized this brief in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing.

interest as *amicus curiae* is to provide historical context that frames the Yakama Treaty and our ancestors' understanding of the rights reserved therein.[2]

SUMMARY OF ARGUMENT

The Washington Supreme Court correctly recognized that Article III, paragraph 1 of the Yakama Treaty secures for Cougar Den—a corporation licensed and regulated under the laws of the Yakama Nation—the right to import fuel into the Yakama Reservation upon public highways free from any state-imposed preconditions or encumbrance. The court's holding is supported by the Supremacy Clause of the United States Constitution, which provides that treaties made under the United States' authority are "the supreme Law of the Land and the Judges in every State shall be bound thereby." U.S. CONST. art. VI, § 2. Accordingly, the State's efforts to tax Cougar Den's 'importation' of goods over public highways must yield to our Treaty-reserved rights.

The State's arguments for ignoring the Washington Supreme Court's interpretation of a state statute principally rely on three cases, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), and *Chickasaw Nation v. United States*, 534 U.S. 84 (2001). All are

[2] All statements made in the first person are offered at the direction of the Confederated Tribes and Bands of the Yakama Nation as directed by the Yakama Nation Tribal Council.

rooted in the doctrine of Christian discovery rather than the Yakama Treaty, and should not be applied here. The 'doctrine of Christian discovery' is the legal fiction that Christian Europeans immediately and automatically acquired legally recognized property rights in our lands upon reaching the Americas, thereby diminishing our sovereignty. Courts have used the doctrine to build a false legal framework to attack Native sovereignty, which the State attempts to deploy here through the aforementioned cases. The Court should expressly repudiate the doctrine and instead rely on the Yakama Treaty as the foundation for its analysis in this dispute.

When interpreting our Treaty, courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citing *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). The most comprehensive examination of the public highway clause's history, meaning, and scope occurred in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). In *Yakama Indian Nation*, the district court issued 90 findings of fact, considered 129 exhibits, and ultimately held that "both parties to the treaty expressly intended that the Yakamas would retain their right to travel outside reservation boundaries, **with no conditions attached**" and that the public highway clause "was clearly intended to reserve

the Yakamas' right to travel on the public highways **to engage in *future* trading endeavors.**" *Id.* at 1251, 1253 (emphasis added). Consistent with this Court's canons of treaty construction, the Ninth Circuit Court of Appeals affirmed these conclusions that the Yakama Treaty extends and protects our economic activities beyond reservation boundaries. *Cree v. Flores*, 157 F.3d at 769 (holding that Article III "guarantee[s] the Yakamas the right to transport goods to market" for "trade and other purposes," and if a state fee or restriction interferes with this right to transport, then it is per se invalid) [hereinafter "*Cree* II"].

As implemented, Washington's fuel importation tax[3] levies a tax and imposes licensing requirements on a specific activity—the 'importation' of fuel, i.e., transporting fuel, into Washington. *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 188 Wash. 2d 55, 69 (Wash. 2017). The Washington Supreme Court correctly determined this statutory "importation tax" places an impermissible condition on the exercise of a Treaty-protected activity. *Id.* at 66 (citing the State's opening brief, which declared that Cougar Den "is being taxed for importing fuel."). The court held "it was simply not possible for Cougar Den to import fuel without traveling or transporting that fuel on public highways," and because Article III's public highway clause

[3] State's *amicus curiae*, The Washington Oil Marketers Association and Washington Association of Neighborhood Stores, falsely implies that the State collects and remits 75% of its collected fuel tax revenue to the Yakama Nation. Br. 6, n. 3. There is no fuel tax compact between the Yakama Nation and the State, nor any such remittance.

"protects [our] historical practice of using the roads to engage in trade and commerce," Cougar Den is exempt from the State's "importation tax." *Id.* at 67, 69. The Washington Supreme Court's decision is consistent with federal precedent, and we respectfully request this Court affirm that decision.

This brief (1) discusses the legal context for the relationship between the Yakama Nation and the United States, (2) provides a history of our People and of the negotiations resulting in the Yakama Treaty, and (3) reviews the relevant federal precedent discussing the context and interpretation of Article III, paragraph 1's public highway clause.

LEGAL CONTEXT

I. THE RELATIONSHIP BETWEEN THE UNITED STATES AND THE YAKAMA NATION IS FOUNDED ON THE YAKAMA TREATY, NOT THE DOCTRINE OF CHRISTIAN DISCOVERY.

The Yakama Treaty is the organic document establishing the government-to-government relationship between the United States and the Yakama Nation. It serves as the basis for any dispute concerning our rights. However, courts have systematically attempted to undermine our Treaty rights by imposing an imaginary prior relationship sourced in the doctrine of Christian discovery. Under that doctrine, this Court judicially manufactured an extra-constitutional

congressional plenary authority to abrogate treaties and regulate Native Nations. This manufactured authority rests on the false assertion that our sovereignty and free and independent existence were "necessarily diminished" upon Christian European arrival on the North American continent. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). For nearly two centuries this Court has dehumanized original, free, and independent Nations and Peoples by issuing decisions and using language consistent with the doctrine's religious and racist foundations—e.g., red man, uncivilized, barbarous, ignorant, unlearned, non-Christians, heathens, savages, infidels—all in an effort to manufacture a legal basis for the physical and cultural genocide of Native Peoples.

Here, the State urges this Court to discard the Yakama Nation's Treaty-reserved right to travel and trade using precedent that is firmly rooted in the doctrine. This doctrine of domination and dehumanization—Christian discovery—is not welcome within Yakama Territory, and should no longer be tolerated in United States law. The Yakama Nation respectfully calls on this Court to repudiate the doctrine of Christian discovery and its racist foundations as the basis for federal Indian law, and instead acknowledge and rely upon the solemn Treaty negotiated between the Yakama Nation and the United States in this dispute and into the future.

A. Doctrine Of Christian Discovery—Origins And Historical Use By The Court.

Since time immemorial, those Nations that would later be confederated as the Yakama Nation exercised natural rights of sovereignty over our lands and Peoples. Yakama culture, as protected and practiced by thousands of us to this day, relies on the responsible use of the Creator's gifts of water, fish, game, roots, and berries found within our lands. The Yakama Treaty was negotiated to protect these reserved rights and natural capital for our future generations, including the preservation of our traditional system of trade beyond reservation boundaries. There is no document more important to us than our Treaty. Just as it was on June 9, 1855, the Yakama Treaty remains the foundation for the Yakama Nation's government-to-government relationship with the United States today. What the United States failed to explain during the Treaty negotiations is that the doctrine of Christian discovery threatened the unilateral abrogation of everything our ancestors fought to preserve in the Yakama Treaty.

The doctrine of Christian discovery is the legal fiction that Christian Europeans automatically acquired legally recognized property rights in all Native lands upon reaching the Americas, as well as governmental, political, and commercial rights over the inhabitants without the knowledge or consent of Native Peoples. Robert J. Miller et al., *Discovering Indigenous Lands* 2 (2010). This doctrine was propagated by the Roman Catholic Church through a series of papal bulls in the 15th century, including Pope Nicholas' 1455 papal bull

authorizing Portugal to "invade, search out, capture, vanquish, and subdue all Saracens and pagans" and to place them into perpetual slavery and take their property. *Id.* at 11. The Roman Catholic Church then implemented a framework where the right to subjugate the Americas was split between Spain and Portugal, although they were later joined by other European states. *Id.* at 12. The doctrine was therefore one of domination and dehumanization of Native Peoples, and was used to perpetuate the most widespread genocide in human history. Robert A. Williams, Jr., *The American Indian in Western Legal Thought* 317 (1990). The United States relies on this genocidal religious doctrine to diminish Native sovereignty to this day.

This Court first applied the doctrine to Native Nations in *Johnson v. M'Intosh*, thereby enshrining in American jurisprudence "the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples." *Id.* In *M'Intosh*, the Court considered a dispute over competing land claims that hinged on the scope of the "power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country." 21 U.S. at 572. The dispute arose after the Illinois and Piankeshaw Nations sold certain parcels of land to a private purchaser, and then sold the same land to the United States. To address the competing land claims, the Court determined that private citizens could not purchase lands from Native Nations, and likewise that Native Nations could not convey land to anyone but the United States. In rejecting the Native Nations'

sovereign rights to sell their lands to whomever they pleased, Chief Justice Marshall explained that:

> It has never been doubted, that either the United States, or the several States, had a clear title to all the lands . . . subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Id. at 584-585. In other words, the Court found that the United States holds clear title to all Native lands subject only to the Native Nation's right of occupancy, which the United States can terminate through purchase or conquest. The basis for this holding is the doctrine of Christian discovery, which the Court described as the principle "that discovery gave title to the government . . . against all other European governments, which title might be consummated by possession." *Id.* at 573. Chief Justice Marshall detailed the effects of the doctrine as giving the United States "ultimate dominion" over Native lands. *Id.* at 574. He used this religious doctrine of domination and dehumanization to unilaterally deprive Native Nations of their sovereign rights, racially juxtaposing the rights of "Christian people" against those "heathens" and "fierce savages." *Id.* at 577, 590.

The domination imposed by *M'Intosh* constitutes a sweeping and unsubstantiated deprivation of the natural sovereign rights of Native Nations. By merely setting foot on a fully populated North American continent, Christian Europeans and, as a successor, the

United States claimed a right to the real property of all Native Nations. Chief Justice Marshall acknowledged this absurdity in his opinion, stating:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Id. at 591. Despite saying the doctrine could not be questioned, he repeatedly questioned his reliance on the doctrine in *Worcester v. Georgia*, 31 U.S. 515, 543-545 (1832), asking how foreigners could claim property rights and dominion over free nations of other places, and how discovery of an already inhabited country annulled the pre-existing rights of ancient possessors. Arguably, Chief Justice Marshall overruled *M'Intosh* in *Worcester*, explaining that the doctrine only gave the United States "the exclusive right to purchase" Native lands, rather than vesting fee title in the United States subject only to the Native right of occupancy. *Id.* at 544. However, this Court's subsequent precedent largely relies on *M'Intosh* rather than *Worcester* to define Native sovereignty and land rights.

While the direct casualties of *M'Intosh* were Native land rights and the millions of Native Peoples who died in the wake of the ongoing doctrine-based genocide, the doctrine has been used regularly by this Court

to diminish Native sovereignty. In *United States v. Kagama*, 118 U.S. 375 (1886), and *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903), the Court announced Congress' extra-constitutional plenary power over all Indian affairs—the plenary power doctrine—which it justified by pointing to Native Nations' loss of sovereign, diplomatic, economic, and property rights upon first 'discovery' by Europeans. In *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), the Court applied the doctrine and held that Congress can unilaterally abrogate Treaty rights with subsequent legislation unless there is an express exemption provided in the Treaty—the last-in-time doctrine. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978), the Court deprived Native Nations of criminal jurisdiction over non-members based on the statement in *M'Intosh* that Native Nations' rights "to complete sovereignty, as independent nations, were necessarily diminished" by European 'discovery'—the diminished tribal sovereignty doctrine.

Federal courts continue to use these judicial constructs to dominate Native Nations and narrow the legal exercise of Treaty rights today. We see this as the gradual push towards the outright judicial termination of Native Nations.

B. Opportunity To Repudiate The Doctrine Of Christian Discovery.

Applied here, both the State and the United States ask the Court to rely on the doctrine to the detriment

of our Treaty-reserved rights. Both briefs rely on *Wagnon v. Prairie Band Potawatomie Nation*, and interchangeably, *Mescalero Apache Tribe v. Jones*, for the proposition that outside Indian Country, Indians are subject to non-discriminatory state laws unless an express federal law says otherwise. Pet. Br. 20-21; United States Br. 13. The Court in *Mescalero* cites *Ward v. Race Horse*, 163 U.S. 504 (1896), for the same proposition, and in *Race Horse* the Court abrogated the 1868 Treaty with the Eastern Band Shoshoni and Bannock Nation based on the transfer of the United States' claim to absolute title over Native lands and Native rights (i.e., the doctrine of Christian discovery) to Wyoming. In other words, both the State's and United States' assertions under *Wagnon* and *Mescalero* are directly linked to the doctrine.

The same analysis is applicable to *Chickasaw Nation v. United States*, which the State asserts for the idea that state tax exemptions for Native peoples outside Indian Country must be clearly expressed and unambiguously proved. Pet. Br. 20. When the Court applied this legal concept in *Chickasaw Nation*, it relied on *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988), which cites to *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), which cites to *The Cherokee Tobacco*, which relies explicitly on the doctrine as aforesaid. When the State argues for application of this tax precedent to undermine our inherent sovereign and Treaty-reserved rights, they are asking this Court to continue wielding the sword of the religious, racist,

genocidal, fabricated doctrine of Christian discovery against our People.

This Court's most troubling decisions throughout history have, in many instances, been repudiated by later Courts. The 'separate but equal' doctrine that justified the segregation of American schools was upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896), but overturned in *Brown v. Board of Education*, 347 U.S. 483 (1954). The right of interracial couples to marry was denied in *Pace v. Alabama*, 106 U.S. 583 (1883), but upheld in *McLaughlin v. Florida*, 379 U.S. 184 (1964), and *Loving v. Virginia*, 388 U.S. 1 (1967). Poll taxes were validated in *Breedlove v. Suttles*, 302 U.S. 277 (1937), but deemed unconstitutional in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). These cases rely on the Fourteenth Amendment which has no bearing here, but the extra-constitutional justification for the doctrine and related jurisprudence make the doctrine of Christian discovery ripe for a similar re-evaluation by this Court. Where a centuries-old doctrine no longer comports with the morals of the time, the use of that doctrine should no longer withstand the Court's scrutiny.

We call on this Court to repudiate the doctrine of discovery, and in this case and all future cases involving our inherent sovereignty and Treaty-reserved rights, rely on the solemn promises made between the United States and the Yakama Nation as the basis for the Court's legal analysis. Here, this counsels an analysis that both starts and stops with the Yakama Treaty, interpreted in accordance with the Treaty Minutes and

with deference to our ancestors' understanding of the Treaty pursuant to the canons of treaty construction.

ARGUMENT

For most people the domination and dehumanization of Native Nations would cause grief. The State sees it as an opportunity to collect revenue. For the State, our history, Treaty, and reserved rights are an inconvenience; however, an inconvenience to the State does not justify undermining the Treaty-reserved rights that shield our people from state laws that encumber, condition, or restrict the exercise of our Treaty-protected activities.

In defiance of the widely accepted history of our people, the State asserts that nothing in our Treaty preempts the State's importation tax. Pet. Br. 17. The State claims the Washington Supreme Court relied on a "lopsided and incomplete description of how [our ancestors and the United States] allegedly understood the treaty when it was signed." *Id.* The State then claims that "[n]othing in the treaty's text or negotiating history suggests that the parties understood they were creating a permanent right for the Yakamas to be free of taxes on goods simply because they transport those goods by highway." *Id.*

In this revealing moment, the State details its true intentions. The State asks this Court to align with its self-serving narrative concerning the circumstances and context under which the Treaty was forced upon a

free and independent people. The State seeks to advance a false narrative that contradicts our ancestors' understanding, as confirmed by historians and accepted as findings of fact by both this Court and others. The State asks this Court to rewrite our history and undermine the promises guaranteed to our ancestors in 1855. The State's intentions are revisionist history at its worst.

The self-serving narrative offered by the State is patently offensive and must be rejected. The United States negotiated the Yakama Treaty to avoid conflict, secure certain rights to millions of acres of land for settlers, and to build a railroad across our homelands. The record shows that our ancestors understood the Treaty to preserve their tradition of extensive travel and trade without economic restrictions. *See Cree* II, 157 F.3d at 769 (the public highway clause "guarantee[s] the Yakamas the right to transport goods to market over public highways without payment of fees for that use."). Our understanding of this sacred Treaty right is consistent with the unequivocal promises made by the United States' negotiators in 1855 that "**you can rely on all its provisions being carried out strictly**." Minutes, App. B 51 (emphasis in original).

The relevant inquiry for this Court is our understanding of the Yakama Treaty's public highway clause within the Treaty's historical context. *See Mille Lacs Band*, 526 U.S. at 196 (when interpreting a treaty courts must "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical

construction adopted by the parties.'"). The record of the Walla Walla Council negotiations reflects that the parties intended to preserve the traditional system of trade and exchange we had engaged in since time immemorial. This Court should interpret the Yakama Treaty consistent with this well-documented truth.

I. ARTICLE III OF THE YAKAMA TREATY RESERVES THE YAKAMA NATION'S RIGHT TO TRAVEL AND TRADE OUTSIDE THE YAKAMA RESERVATION.

A. Since Time Immemorial, Travel And Trade Have Been Central To Yakama Culture And Traditions.

In pre-contact times our ancestors ranged over 12,000,000 acres from the confluence of the Columbia and Methow Rivers southwesterly along the Columbia to the Cascade Range. This territory included Mount Adams in the Cascades and the north side of the Snake River, downstream of the confluence of the Palouse. From this territory, our ancestors traveled to fish, hunt and trade both westward to the Puget Sound and Willamette Valley, and eastward to the buffalo country in the Plains. Above all, our ancestors were people of the land who followed a seasonal cycle of movement that was governed by kinship, cultural practices, geography, climate, and availability of resources. *See Yakama Indian Nation*, 955 F. Supp. at 1238, 1262-1263. Freedom of movement was key to our ancestors' way of life, and it remains so today.

In economic terms, the lands, waters and salmon producing capacity of our traditional territories represented the 'natural capital' upon which our ancestors depended. This natural capital produced the annual harvests of salmon and other fish, of game, and of roots, berries and plants that our ancestors used to survive and prosper. They "traded these items for goods such [as] buffalo products, especially buffalo hide and dried buffalo meat." *Id.* at 1238. This traditional system of trade and exchange supported their subsistence, religious and cultural practices, and "[t]herefore, propitious trading was considered the art of survival." *Id.* at 1239 (internal quotations omitted).

Our ancestors' way of life depended on goods that were not available in the immediate area. In addition to the constant trading between the fourteen tribes and bands that now comprise the Yakama Nation, our ancestors traveled "to the Pacific Coast, the Columbia River, the Willamette Valley, California, and the plains of Wyoming and Montana to engage in trade" with other Native Nations. *Id.* at 1238. They also traded goods with non-Indians, including settlers and commercial traders such as those from the Hudson's Bay Company. *Id.* Our ancestors, given their central location, were the linchpin in a well-defined trading network involving the exchange of goods and services existing between Native Nations throughout the Pacific Northwest and surrounding areas.

B. Territorial Governor Isaac Stevens Knew The Importance Of Trade And Travel To Our Ancestors Prior To Negotiating The Yakama Treaty.

The United States claimed the area now embraced within the State of Washington by discovery, settlement, and by extinguishing the conflicting claims of Spain (1819), Russia (1824), and Great Britain (1846) by treaty. *United States v. Washington*, 384 F. Supp. 312, 353 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). In 1848 Congress established the Oregon Territory, 9 Stat. 323 (Aug. 14, 1848), and in 1850 Congress authorized the negotiation of treaties to extinguish Indian title to lands lying in the Oregon Territory. 9 Stat. 437 (June 5, 1850). The Washington Territory—including the present day State of Washington—was then organized out of the Oregon Territory in 1853. 10 Stat. 172 (Mar. 2, 1853).

The United States was under pressure to negotiate treaties with Native Nations in the eastern Washington Territory because our lands were important for future settlement plans. To accomplish this task, the United States authorized Isaac Stevens, Governor of the Washington Territory, and General Joel Palmer, Superintendent of Indian Affairs in the Oregon Territory, to negotiate treaties on the United States' behalf. Governor Stevens was prompted to extinguish title to lands belonging to our ancestors, or obtain a right of way through our lands, for the purpose of constructing a railroad route through the Cascade Mountains to Puget Sound, and to secure land for settlers moving into

the Washington Territory. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 699 (1979) (Stevens, J., dissenting).

The evidence reflects that Governor Stevens and his emissaries had significant knowledge of our character and lifestyle as the great traders and travelers of the Central Plateau. In the years before the Treaty, Governor Stevens' emissaries described our ancestors as "manifesting a peculiar aptitude for trading," purchasing from the settlers "feathers, beads, cloth, and other articles prized by Indians," and "exchanging them for horses, which they in turn sell in the settlements." *See* Report of Mr. George Gibbs to Captain Mc'Clellan, on the Indian Tribes of the Territory of Washington, March 4, 1854, published as *Indian Tribes of the Washington Territory* 3 (1978).

They recognized the existence of our trading routes, noting that our ancestors were persistent traders west of the Cascade Mountains, traveling on trails through "the [Naches] and main Yakima passes, taking horses for sale to Nisqually, and to purchasing [dentalium shells], dried clams, and other savage merchandise, on their return." *Id.* at 8; *see also United States v. Washington*, 384 F. Supp. at 380 (finding our ancestors traded with Native Nations west of the Cascade Mountains using trails through the Snoqualmie, Naches, and Stevens passes). They knew our trading routes reached the Nez Perce Country in the Snake River basin. Report of A.J. Bolon to His Excellency Isaac I. Stevens, Governor and Superintendent of Indian Affairs, Washington Territory, September 30, 1854, records of the Washington Superintendent of Indian

Affairs 1853-1874 (stating "I learned from him that a route exists from the Salmon Falls of the Snake to the Yakima, much shorter than any pursued by the whites, & without hills.").

Governor Stevens' emissaries also knew that our ancestors traveled to and controlled parts of the Willamette River system in Oregon, stating: "[t]hey thus became acquainted with other parts of the country, as well as with the advantage to be derived from trade. It was not, however, until about 1839 that they crossed the Columbia, when they overran the Willamette valley, attracted by the game with which it abounded, and which they destroyed in defiance of the weak and indolent Callapooyas. They still boast that they taught the latter to ride and hunt." Report of Mr. George Gibbs, 3. This route was the principal route traveled by our ancestors to reach our trading center and fisheries at Celilo Falls and beyond.[4]

Pre-Treaty, Governor Stevens knew our ancestors were the linchpin to a trading confederacy. They knew our ancestors controlled the Central Plateau and traveled regularly to the Willamette Valley, to the Puget Sound, and to the Plains. They knew that travel for the purpose of trade was crucial to our ancestors' existence. *See Yakama Indian Nation*, 955 F. Supp. at

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[4] Present day, Cougar Den, Inc. uses this same trade route to transport goods to market via public highway by traveling to and from the Yakama Reservation through Satus Pass and across the Columbia River.

1238-1240, 1263. This was the context within which the Yakama Treaty was negotiated.

C. The Treaty Signatories Understood Article III To Reserve The Right To Continue Traveling And Trading As They Had Before The Treaty.

The historical record establishes that prior to the Yakama Treaty, the United States was aware of the importance of travel and trade to our ancestors. The United States also knew our ancestors would not negotiate without preserving these rights. Armed with this knowledge, Governor Stevens and General Palmer called our ancestors to join the Walla Walla Council in 1855. There was, however, no enthusiasm for the Council among Kamaiakun, Skloom, Owhi, Te-cole-kun, Lahoom, Koo-lat-toose, Sch-noo-a, Me-ni-nock, Shee-ah-cotte, Sla-kish, Elit Palmer, Tuckquille, Wish-och-knmpits, Ka-loo-as and other head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat Nations. App. 2, 13. Their attendance had been solicited under threat of genocide. Earlier in 1854, Governor Stevens had met with Ow-hi and asked that he deliver a message to the Native leaders indicating that a council be gathered and that the soldiers would come and "wipe them off the face of the earth . . . " if they refused to negotiate a treaty. *See* A.J. Splawn, *Ka-mi-akin, the last hero of the Yakimas* 31 (1917).

These threats continued during the Treaty negotiations. When Kamaiakun told Governor Stevens that he would not grant land to the United States and that he was heading home, Governor Stevens held the Treaty up and exclaimed that if the tribal leaders did not sign, "you will walk in blood knee deep." *See* Andrew Pambrun, *Sixty Years on the Frontier in the Pacific Northwest* 95 (1978) (relating the conversation between Governor Stevens and our ancestors at the Walla Walla Council from his perspective as Governor Stevens' interpreter). Given this 'incentive', our ancestors signed knowing that refusal would result in death.

Further, the Treaty negotiations took place entirely through interpreters using the Chinook jargon, which consisted of only 300 words developed for commercial interactions rather than being the primary language of any Native Nation. *Fishing Vessel*, 443 U.S. at 667 n.10. Many of the United States' representations did not have an adequate translation in our language. *Id.*; *see also United States v. Washington*, 384 F. Supp. at 356 (observing that Chinook jargon was inadequate to express the legal effects of the treaties, and that many Indians did not understand Chinook jargon).

Despite these challenges, the verbal promises made by the United States' negotiators were captured in Treaty Minutes taken by the United States. App. B 15-117. These Minutes and the historical record must be relied upon when determining our Treaty's meaning. *See Mille Lacs Band*, 526 U.S. at 196 (courts must "look beyond the written words to the larger context

that frames the Treaty, including the history of the treaty, the negotiations, and the practical construction adopted by the parties."); *see also Fishing Vessel*, 443 U.S. at 676 (holding that in three prior cases concerning the Yakama Treaty, this Court construed the rights reserved by Article III "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by [our ancestors]").

The United States made numerous promises and representations to our ancestors during the Walla Walla Council. The United States promised that if our ancestors agreed to cede certain rights in over 10,000,000 acres of land and move to the Yakama Reservation—an area just one-tenth the size of the lands ceded—they would reserve forever the right to exercise their traditional way of life, including their traditional system of trade and exchange. As captured in the Treaty Minutes, the subject of travel and trade was an issue "of significant importance to both [our ancestors] and Governor Stevens." *See Yakama Indian Nation*, 955 F. Supp. at 1266.

At no less than five (5) places in the Treaty Minutes, the United States promised our ancestors that they would be allowed unrestricted travel over the roads to support their trading endeavors. Governor Stevens supported the Reservation's location based on its proximity to the 'great road', stating **"[y]ou will be near the great road and can take your horses and your cattle down the river and to the Sound to market."** App. B 64 (emphasis in original). Twice

more he emphasized the unrestricted right to use the highways for trading: "**[y]ou will be allowed to go on the roads to take your things to market, your horses and cattle**," and also that our ancestors, "**shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market**." App. B 68, 71 (emphasis in original).

Governor Stevens' assurances of unrestricted use of roads for the express purpose of trade were supported by General Palmer, who explained "[m]y Brother has stated that you will be permitted to travel the roads outside the Reservation" and, "[n]ow as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for injury." App. B 73, 74.

These representations were understood by our ancestors as more than mere platitudes, puffery, or aspirational statements. Our ancestors "relied on these promises and they formed a material and basic part of the treaty and [our ancestors'] understanding of the meaning of the treaty." *United States v. Washington*, 384 F. Supp. at 381. "As the Treaty minutes reflect, [Governor] Stevens unconditionally guaranteed that [our ancestors] would have the right to take their . . . goods to market," and the "statements regarding [our ancestors'] use of the public highways to take their goods to market clearly and without ambiguity promised [our ancestors] the use of public highways without

restriction for future trading endeavors." *Yakama Indian Nation*, 955 F. Supp. at 1253, 1265.

The Treaty language, the Treaty Minutes, and the historical record are graphic and consistent. They tell only one story—the United States received the cession of certain rights in over 10,000,000 acres of land, and in return our ancestors reserved a guaranty of unrestricted off-Reservation activities, including the use of the public highways without restriction to preserve and continue our ancestors' traditional system of trade and exchange.

II. THE YAKAMA NATION'S RIGHT TO TRAVEL INCLUDES THE RIGHT TO TRADE FREE FROM ENCUMBRANCE BY THE STATE.

It is a well-established canon of treaty construction that the Yakama Treaty's provisions must be interpreted "in the sense in which they would naturally be understood by [our ancestors]." *Fishing Vessel*, 443 U.S. at 676; *see also Tulee v. United States*, 315 U.S. 681, 684-685 (1942) (stating "[i]t is our responsibility to see that the terms of the treaty are carried out . . . in accordance with the meaning they were understood to have by the tribal representatives at the council"). The Ninth Circuit applied this analytical framework to our right to travel and trade in *Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996), which addressed the Yakama Treaty's preemptive effect on state commercial licensing regulations and fees. In holding that the district court failed to develop the factual record necessary to

determine "what [our ancestors] understood their right to use government-built highways to encompass," the Ninth Circuit expressly rejected the State's argument that we "bear the burden of proving a [state] tax exemption in the Treaty." *Id.* at 1403. The Ninth Circuit remanded with instructions that the district court "undertake a factual inquiry into the intent and understanding of the parties at the time the Treaty was signed to determine the meaning of the [Article III] highway right." *Id.* at 1404.

On remand, United States District Court Judge Alan McDonald undertook a *Fishing Vessel* treaty analysis and carefully parsed out the meaning of Article III's public highway clause. *Yakama Indian Nation*, 955 F. Supp. 1229. Judge McDonald concluded that, "the language of the Treaty, when viewed in historical context as [our ancestors] would have understood it, unambiguously reserves to [our people] the right to travel the public highways without restriction for purposes of hauling goods to market." *Id.* at 1248. He ruled that the Treaty "precludes the state from imposing licensing and permitting fees and registration requirements indirectly exacting such fees on [our] trucks when hauling tribal goods to market." *Id.* at 1249.

Washington appealed to the Ninth Circuit, who again relied on *Fishing Vessel* to affirm the district court's findings, conclusions, and grant of summary judgment in favor of our People. *Cree* II, 157 F.3d 762. The Ninth Circuit praised the district court's "careful inquiry into the intentions of the parties at Walla Walla," *Id.* at 774, observing that the "district court

eloquently set forth its findings that travel was of great importance to [our ancestors], that they enjoyed free access to travel routes for trade and other purposes at Treaty time, and that they understood the Treaty to grant them valuable rights that would permit them to continue in their ways." *Id.* at 769. Consistent with this Court's canons of treaty construction, the Ninth Circuit affirmed that the Article III public highway clause "must be interpreted to guarantee [our people] the right to transport goods to market over public highways without payment of fees for that use." *Id.*

A. Article III's Public Highway Clause Reserved The Yakama Nation's Right To Conduct Economic Activities Beyond The Reservation Boundaries.

Judge McDonald interpreted our right to travel and trade beyond reservation boundaries without restriction or condition attached by looking at both the Treaty's written text and the larger historical context of the Treaty negotiations. *Yakama Indian Nation*, 955 F. Supp. 1229. In doing so, the district court found that prior to the Treaty's signing, the historical record "unquestionably depicts a tribal culture whose manner of existence was ultimately dependent on [our ancestors'] ability to travel," that "far-reaching travel was an intrinsic ingredient in virtually every aspect of [our ancestors'] culture," that "[t]ravel was significant for many reasons, including trade," and that our ancestors "had a well-known reputation for being 'inveterate

traders'" with extensive trading practices exercised "throughout the Northwest and beyond." *Id.* at 1238.

Judge McDonald's review of the historical record illuminated the parties' express intention to preserve our ancestors' traditional system of trade and "modern economic enterprise" that was "secured unconditionally and without restriction. . . ." *Id.* at 1249, 1253. Thus, the district court found that the United States' "statements regarding [our ancestors'] use of the public highways to take their goods to market clearly and without ambiguity promised [our ancestors] the use of public highways without restriction for future trading endeavors." *Id.* at 1265.

Judge McDonald also rejected the State's argument that Article III, paragraph 1's 'in common with' language meant we were to be placed on equal footing with non-Indians and subject to the same restrictions. *Id.* at 1246-1256. Rather, Judge McDonald held that, "it seems clear that [our ancestors] understood the term 'in common with' as common usage among Indians and non-Indians with no restriction placed upon tribal members," and that the historical record supported finding that the term 'in common with' was understood by both parties to mean that our ancestors:

> "retained the *right* to travel the public roads, on and off-reservation, and that right would be exercised 'in common with' non-Indians. In other words, both [our ancestors] and non-Indians would use the public roads simultaneously."

Id. at 1247. Based upon the evidence before it, the district court found that our ancestors understood that Article III, paragraph 1's 'in common with' language would not limit or restrict our right to travel on public highways for purposes of trade.

Given this extensive factual review, the Ninth Circuit affirmed the district court and held that Article III, paragraph 1 of the Yakama Treaty "guarantee[s] the Yakamas the right to transport goods to market over public highways" outside the Reservation's boundaries, free from "payment of fees for that use." *Cree* II, 157 F.3d at 769. The Ninth Circuit in *Cree* II declined the State's invitation to interpret the 'in common with' language found in Article III, paragraph 1, "against the grain of Supreme Court precedent and in contravention of the district court's factual inquiry into the meaning of the ['in common with'] language in the context of the Treaty." *Id.* at 771-772.

The State is precluded from challenging this settled law. Once a court has decided an issue of fact or law necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153 (1979). The issue of whether Article III, paragraph 1 secures our right to travel and preserves our traditional system of trade and exchange beyond our Reservation's boundaries was decided in proceedings identical to that which the State seeks to relitigate here. The Ninth Circuit's opinion and order in *Cree* II is a final judgment on the merits, and the parties to that action are the same parties

or are in privity with the parties here. Issues of fact and law affirmed by *Cree* II are "forever settled as between the parties," and the State is precluded from obtaining such relief in this action. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, ___ U.S. ___ (2015) (quoting *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). Moreover, the State did not appeal the decision below that those findings have preclusive effect in this case.

B. *In Common With* Was Never Understood By The Yakamas To Limit Our Rights.

The historical findings of *Yakima Indian Nation* (and in turn, *Cree* II) are consistent with this Court's precedent. On the surface, the language of the Yakama Treaty seems unequivocal. Article III, paragraph 1 secures our right to "travel upon all public highways." 12 Stat. at 952-953, App. A 6. This right, however, contains an important qualification. It is a "right . . . " reserved "in common with citizens of the United States . . . " *Id.* The definition of 'in common with' has a long history before this Court. Persons and states who opposed the reservation of sovereign rights to our People have argued that the term 'in common with' meant that our Treaty reserved nothing more than the rights held by any other citizen. This Court—in no fewer than four previous occasions—rejected that argument, finding that Article III reserved to us specific and important rights. In each of these opinions, this Court emphasized the importance of applying the canons of treaty

construction to interpret our Treaty as our ancestors understood it at the Walla Walla Council in 1855.

This Court's first Yakama Treaty-related opinion, *United States v. Winans*, 198 U.S. 371 (1905), was decided fewer than fifty years after the Senate ratified our Treaty. This Court held that judicial interpretation of the rights reserved in the Yakama Treaty required consideration of evidence beyond the Treaty language itself:

> [The district court] decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. **This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more.** And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules." How the treaty in question was understood may be gathered from the circumstances.

Id. at 380-381 (citations omitted) (emphasis added). In *Winans*, this Court found that Article III's "right of taking fish in common with citizens . . . " language, as understood by our ancestors, encompassed broader rights

than those held by ordinary citizens, including perpetual easements over private lands for the exercise of such rights despite the Treaty's silence on that issue. 198 U.S. at 384.

In *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), this Court held that Article III's "right of taking fish in common with citizens . . . " language imposed the same easement on lands in Oregon, even though Oregon was outside the boundaries of the lands ceded by our ancestors. The Court reasoned that efforts "[t]o restrain [us] to fishing on the [Washington] side of the shore of the [Columbia] river would greatly restrict the comprehensive language of the treaty, . . . and would substitute for the natural meaning of the expression used, . . . the artificial meaning which might be given to it by the law and by lawyers." *Id.* at 199.

In 1942, this Court determined that Article III's "right of taking fish in common with citizens . . . " language specifically included the right to do so without the payment of fees to the State for the exercise of that reserved right. *Tulee*, 315 U.S. 681. Justice Hugo Black wrote for a unanimous Court and determined that such a fee, even though applied in a non-discriminatory manner, "acts upon [us] as a charge for exercising the very right their ancestors intended to reserve . . . [and] that such exaction of fees as a prerequisite to the enjoyment [of our Treaty-reserved rights] cannot be reconciled with a fair construction of the treaty." *Id.* at 685.

Again in 1979, this Court interpreted Article III as guaranteeing more than the same access to the resources as held by all citizens. In *Fishing Vessel*, this Court confirmed:

> It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. . . . **But we think greater importance should be given to the Indians' likely understanding of the other words in the treaty** and especially the reference to the "right of taking fish"—a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . .
>
> This interpretation is confirmed by additional language in the treaties. The fishing clause speaks of "securing" certain fishing rights, a term the Court has previously interpreted as synonymous with "reserving" rights previously exercised.

443 U.S. at 677-679 (citations omitted) (emphasis added).

It is therefore clear from the record and the precedent of this and other courts, that the 'in common with' language employed in Article III, paragraph 1 of the Yakama Treaty serves as a reservation of our right to travel and trade beyond the Reservation's exterior

boundaries just as our ancestors did prior to the Treaty, and free from State-imposed conditions or restrictions.

C. The Treaty Preempts Non-Discriminatory *State* Regulations That Conflict With The Treaty And Generate Revenue For The State.

The relationship between federal and state governments, so far as it concerns Native Nations and peoples, is controlled by the Supremacy Clause and its concept of preemption. The Supremacy Clause provides that, "Laws of the United States . . . and all Treaties . . . made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

No distinction is drawn between treaties made with Native Nations and those made with foreign nations. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 197 (1876); *Worcester v. Georgia*, 31 U.S. at 559. Thus, in the area of federal Indian law, the Supremacy Clause has been consistently and forcefully applied. *Williams v. Lee*, 358 U.S. 217 (1959). Appropriately, when a treaty and state law conflict, the treaty controls and the state law must yield. *Zschernig v. Miller*, 389 U.S. 429, 440-441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Missouri v. Holland*, 252 U.S. 416, 433-435 (1920).

As applied, the State may not enforce its regulations against Cougar Den when they conflict with rights reserved under Article III of the Yakama Treaty, even when, as alleged here, the State law is non-discriminatory and directed at off-Reservation activity. Pet. Br. 16. In *Tulee*, a Yakama fisherman contended that a state statute compelling him to obtain a license in order to fish off-Reservation violated Article III. 315 U.S. 681. This Court held that the imposition of licensing fees was impermissible because it acts as a charge for exercising the very right our ancestors intended to reserve. *Id.* at 684-685. Following this principle, the district court in *Yakama Indian Nation* likewise held that the State's non-discriminatory road use regulations (license and permitting fees) meant for preservation and maintenance of the roads do not overcome our Treaty-reserved Article III rights when those regulations, just as in *Tulee*, are designed to generate revenue to support the State government and its institutions. 955 F. Supp. at 1255.

In light of *Tulee* and *Yakama Indian Nation*, the Washington Supreme Court held that the Yakama Treaty is a federal law that preempts laws of the State that place a condition on our use of public highways affecting our Article III right to transport goods to market without restriction. *Cougar Den*, 188 Wash. 2d at 68-69. It found such restriction to be more than simple regulation of a Treaty-protected activity, with the licensing requirement here serving as a vehicle for tax collection and therefore not falling under any regulatory exception. *Id.* at 67.

Tulee and *Yakama Indian Nation* make clear that while our people may be expected to accommodate the State when exercising our Treaty-reserved rights, or even acquiesce to some types of regulation when the public good is served, accommodation does not mean subsidization. Under *Tulee*'s precedent, we cannot be compelled to pay the State to exercise the very rights our ancestors reserved by Treaty.

CONCLUSION

The facts before this Court concerning the Treaty negotiations are clear as to what the United States promised our ancestors. Article III, paragraph 1 of the Yakama Treaty reserved our tradition of extensive travel and trade without economic restrictions. Our ancestors' understanding is consistent with the unequivocal representations made by the United States at the Walla Walla Council in 1855.

As implemented, the State's fuel importation tax encumbers and imposes conditions on an express Treaty-protected activity—the transportation of goods to market. The State's effort to fine Cougar Den for traveling in noncompliance with the conditions of its importation regulation must yield to the promises made to our ancestors in 1855. The State wishes Governor Stevens had negotiated a more limited Treaty or, better yet, none at all. But he did not, and the commitments the United States made in 1855 are commitments that survive into the 21st century.

The Yakama Nation respectfully requests that this Court affirm the Washington State Supreme Court's holding.

Respectfully submitted,

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APPENDIX A

12 Stat. 951
(TREATY)

TREATY WITH THE YAKAMAS, 1855.

June 9, 1855.

WHEREAS a treaty was made and concluded at the Treaty Ground, Camp Stevens, Walla-Walla Valley, on the ninth day of June, in the year one thousand eighth hundred and fifty-five, between Isaac I. Stevens, governor, and superintendent of Indian affairs, for the Territory of Washington, on the part of the United States, and the hereunder named head chiefs, chiefs, headmen, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederate tribes and bands of Indians, occupying lands lying in Washington Territory, who, for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said bandes and tribes, and being duly authorized thereto by them; which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty-ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, headmen, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

ARTICLE 1

The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, (119 degrees 10',) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47 degrees) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence in a southesterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "LaLac;" thence southerly to a

point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

ARTICLE 2

There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE 3

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE 4

In consideration of the above cession, the United States agree to pay to the said confederated tribes and bands of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: Sixty thousand dollars, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and a suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: For the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars each year; for the next five years, six thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefit of said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE 5

The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmith's shops, to one of which shall be attached a tin-shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said confederated tribes and bands of Indians is expected, and will be called upon to perform many services of a public character, occupying much of his time, the United States further agree to pay to the said confederated tribes and bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such person as the said confederated tribes and bands of Indians may select to be their head chief, to build for him at a suitable point on the reservation a comfortable house, and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such head chief so long as he may continue to hold that office.

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized[8] head chief of the confederated tribes and bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said confederated tribes and band of Indians. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE 6

The President may, from time to time, at his discretion, cause the whole or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE 7

The annuities of the aforesaid confederated tribes and bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8

The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defence, but will submit all matters of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9

The said confederated tribes and bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said confederated tribes and bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

ARTICLE 10

And provided, That there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

ARTICLE 11

This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chief, chiefs, headmen, and delegates of the aforesaid confederated tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent. (L.S.)

Kamaiakun, his x mark. (L.S.)

Skloom, his x mark. (L.S.)

Owhi, his x mark. (L.S.)

Te-cole-kun, his x mark. (L.S.)

La-hoom, his x mark. (L.S.)

Me-ni-nock, his x mark. (L.S.)

Elit Palmer, his x mark. (L.S.)

Wish-och-kmpits, his x mark. (L.S.)

Koo-lat-toose, his x mark. (L.S.)

Shee-ah-cotte, his x mark. (L.S.)

Tuck-quille, his x mark. (L.S.)

Ka-loo-as, his x mark. (L.S.)

Scha-noo-a, his x mark. (L.S.)

Sla-kish, his x mark. (L.S.)

Signed and sealed in the presence of - -

James Doty, secretary of treaties,

Mie. Cles. Pandosy, O. M. T.,

Wm. C. McKay,

W. H. Tappan, sub Indian agent, W. T.,

C. Chirouse, O. M. T.,

Patrick McKenzie, interpreter,

A. D. Pamburn, interpreter,

Joel Palmer, superintendent Indian affairs, O. T.,

W. D. Biglow,

A. D. Pamburn, interpreter.

APPENDIX B

Record of the official proceedings at the Council, held at the Council Ground in the Walla Walla Valley, with the Yakama Nation of Indians, and which resulted in the conclusion of a Treaty on the 9th day of June 1855.[1]

[1] Record of the official proceedings at the Council in the Walla Walla Valley, in U.S. Dep't of the Interior, *Report on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* (1942) (available at https://www.sos.wa.gov/library/publications_detail.aspx?p=116).

PROCEEDINGS AT INDIAN TREATIES IN WASHINGTON TERRITORY

EAST OF THE CASCADE MOUNTAINS

Programs of operations at the Walla Walla Council decided upon by the Commissioners Gov. Isac I. Stevens and Superintendent Joel Palmer, May 22nd A. D. 1855.

Present--Indians common to both Territories, Oregon and Washington, viz. Nes Perces, Cayuse and Walla Wallas. Tribes in Oregon from the western boundary of the Snake Tribe to the Cascades of the Columbia. Tribes in Washington from the Bitter Root to the Cascades, except the Spokanes, Couer d'alenes, Colvilles and Pend D'Oreilles.

Gov. Stevens and Gen'l Palmer Superintendent of Washington and Oregon to act jointly for the Nes Perses, Walla Wallas and Cayuse common to the two Territories. To agree upon the terms of treaty. To sign jointly Each acting for the Indians the above tribes in his own jurisdiction.

Gen'l Palmer sole commissioner for the Oregon Indians proper present at the council.

Gov. Stevens, sole commissioner for the Washington Territory Indians proper present at the council.

Gov. Stevens to preside at the council.

The proceedings to be carefully recorded for the Tribes common to the two Territories seperately by the Secty of Gov. Stevens and the Secty of Gen'l Palmer.

The proceedings to be carefully recorded for the Tribes common to the two Territories seperately by the Secty of Gov. Stevens and the Secty of Gen'l Palmer.

The two records to be carefully compared and certified jointly by the commissioners.

Each commissioner to appoint an agent and commissary.

Gov. Stevens for the Washington Nes Perses, Cayuses and Walla Wallas. Gen'l Palmer for the Oregon Nes Perses, Cayuses and Walla Wallas. Goods and provisions to be distributed to the Nes Perses, Cayuses and Walla Wallas, by the Superintendents in proportion to the Indians under the jurisdiction of each.

OFFICERS OF THE JOINT TREATY

Gov. Stevens

Gen'l Palmer - Commissioners

James Doty Sect'y for Washington Territory

Wm. McCoy " " Oregon "

H. A. Crosbie Commissary for Washington Territory

C. Olney " " Oregon "

Agent R. R. Thompson, in charge of Oregon Nes Perses,

Cayuses and Walla Wallas.

Wm. Craig Interpreter, Washington Territory

N. Raymond " " "

Leaufoher interpreter, Oregon Territory

John Flette "

Censuses of the Nes Perses, Cayuses and Walla Wallas.

	Washington Ter'ty	Oregon Ter'ty	Total
Nes Perses	1400	400	1800
Cayuses	150	350	500
Walla Wallas including Utillas	600	200	800
	2150	950	3100

This census to be revised on the Indians reaching the ground.

A public table for the prominent cheifs under charge of agents Landsdale, Thompson and Bolon.

Gov. Stevens details Palmer and F. Genitto.

Sup't Palmer also details one or two men.

Coll. Crosbie to take personal charge of issues for public table, of issues of provisions to Indian tribes, and goods distributed. Provisions and goods to be turned over to the agents, and issued under their direction.

May 28th, Monday.

Agent Bolon with an interpreter went to meet the Yakamas who are supposed to be near at hand, and returned at 10 a.m. having seen Cam-i-ah-kum and also the Chief Pee-o-pee-mox-a-mox.

The latter had said to Mr. Bolon, "that someone had informed him that the cheifs and others in the Commissioners camp had said that he was unfriendly to the whites. That his heart was with the Cayuses whose hearts were bad. He was very sorry to hear this. He had always been friendly to the whites and was so now. He should go today to see the Commissioners, and ask why such things had been said of him."

The Commissioners and Sec'ty Doty visited the Lawyer at his lodge, as he was unable to walk without great difficulty. An old gun-shot wound received at the battle of Pierres Hole, having broken open again causing much pain.

The Lawyer explained a map of the Nes Perses country which he had drawn for Gov. Stevens. Several cheifs came in and suddenly U-u-sune-mal-e-can,/one of the cheifs/ said:

"The Cayuses wish us to go to their camp and hold a council with them and Pee-o-pee-mox-a-mox.

What have we to say to the Cayuses or Pee-pee-mox-a-mox? What are their hearts to us? Did we propose to hold a council with them or ask them for advise? Our hearts are Nes Perses hearts and we know them. We came here to hold a great council with the Great Cheif of the Americans, and we know the straight forward truth to pursue and are alone responsible for our actions. Three Cayuses came last night and spoke to Jim and two other head men urging them to come to a council at the Cayuse camp, to meet Pee-o-pee-mox-a-mox and Cam-i-ah-kum. He did not wish to go; they insisted; then I said to them: You had best say no more. His mind is made up.

What do you come here for and ask these cheifs to come to a council when to the Head Cheif and the rest you say nothing? Have we not told your messenger, yesterday, that our hearts are not Cayuse hearts? Go home! Our cheifs will not go. We have our own people to take care of they give us enough trouble, and we will not have the Cayuse troubles on our hands. This is my heart."

Lawyer opened a book containing in their own language the advice left to them by their Great Cheif Ellis, and read as follows: Ellis said,

"Whenever the Great Cheif of the Americans shall come into your country to give you laws, accept them!

The Walla Wallas heart is a Walla Wallas; a Cayuse heart is a Cayuse; so is a Yakamas heart a Yakamas; a Nes Perses heart is a Nes Perses heart; but they have all received the white law. They are all going straight, yes! While the Nes Perses are going straight, why should they turn aside to follow others who are going straight? Ellis, advice is to accept the white law. I have read it to you to show my heart."

The Commissioners were glad to hear what had been spoken. They know the Nes Perses were always friendly to the whites. Lewis & Clark had said this and all white men. The Commissioners were friendly to all Indians, and when they come together would tell them so, and show it by what they propose to do. They had no more to say now because when they spoke they wanted all the Indians to hear. The Commissioners then returned to camp.

At 11 a.m. Pee-o-pee-mox-a-mox, Cam-i-ah-cum, Owhi, Skloom and a number of Walla Wallas and Yakamas rode into camp, and having shaken hands in the most friendly manner, with the Commissioners and agents, seated themselves under the arbor in front of the Commissioners tent and indulged in a smoke; using their own tobacco exclusively although other was offered them.

Gov. Stevens then said to them: "My friends, we are glad to see you. We are glad to see all the Indians around here, and what we say is spoken to all the tribes. When you are ready to come into council, when the council is opened, we will speak to you of the important business for which you have been called together. We have near to our hearts the prosperity of

the Indians and the propositions to be made to you will prove this.

We shall endeavor to clearly explain the wishes of the Government, in order that you may fully understand them; as it is our desire you should.

If it is convenient to you we will suggest tomorrow at noon as the time for opening the council. We look upon you as friends, shall so speak to you; as one friend speaks to another, and wish you to reply as such.

Gen'l Palmer said: I am equally pleased with Gov. Stevens to see you. Many years ago I met you and considered you friends, and I look upon you as the same now, and hope our meeting will prove this to be true.

We come here to promote peace and happiness among you, leaving behind all that was bad, bringing only that which was good; thus we have but one heart. When you understand this then there will be no difficulty, but we will all work together for the best.

As all the cheifs are not here we will not speak of important business, but wait till all are present.

I wish to know if the time fixed by Gov. Stevens for opening the council is good, and if you will meet.

Pee-o-pee-mox-a-mox said: I want more than one interpreter at the Council, that we may know they translate truly.

Gen'l Palmer said: You may have any one who can comprehend what he is told to interpret, and who will suit you. We wish you to understand clearly what is

said. Will you designate a interpreter whom you have confidence in?

The Chief said: I do not wish my boys running around the camps of the whites as these young men do. (alluding to some young Nes Perses who were lounging about our camp feeling quite at home as they knew themselves to be among friends.)

Pee-o-pee-mox-a-mox said: We have rode over today merely to see the Commissioners.

Gov. Stevens said: Come and see us as our friends and guests. Cam-i-ah-kum knows that our people have been in his country, and eaten of his food. So of Pee-o-pee-mox-a-mox and the Nes Perses. We always give food to our friends when they visit us, you have been invited to come and you are welcome to whatever we have.

We have a public table at which we are glad to have all our friends sit, and share that which hospitality induces us to offer.

We have provided plenty of food, and have already given beef, corn, and potatoes to those on the ground. They were invited and we wish them to have plenty to eat.

I was glad to hear that my friend Skloom had been so kind to Mr. Tinkham one of my party who crossed the mountains. He was in want and Skloom gave him provisions and clothing.

The Cheifs then took their leave.

PROCEEDINGS AT THE COUNCIL HELD AT CAMP STEVENS

WALLA WALLA VALLEY, ON THE 29TH DAY OF MAY 1855

Gov. Stevens, Superintendent of Indian Affairs in Washington Territory, and Gen'l Joel palmer, Superintendent of Indian Affairs in Oregon Territory, with the following named cheifs, delegates and head men present at the Council, and representing their respective tribes and bands of Indians as below stated.

For the Nes Perses: Lawyer, Joseph, U-u-sune-mal-e-can, James, Timothy, Red Wolfe, Spotted Eagle, Three Feathers, Jason, Jacobs, Cow-pook, Is-coh-tim, Kay-kay-map, Tu-per-lan-its-a-kum, Billy, Toh-ton-mol-e-wot, The Snipe, Bold Eagle, and others.

For the Cayuses: The Young Cheif, Steachus, Camaspilo, and others.

For the Walla Wallas: Pee-o-pee-mox-a-mox

For the Yakamas: Cam-i-ah-kun, Ow-hi, Skloom, Kow-was-say-ic, Si-ry-was, Skin-pah.

For the Palouses: Kah-lat-toose

For the Spokanes: Gerry

For the Pisquose and Metows.

For the Oak-kin-a-kanes.

On May 29th, at 2:02 p.m. the Council opened. Present; the commissioners, officers of Treaties, the Indian agents, and some fifty citizens.

Besides the Indian cheifs already mentioned and some others, about 1800 Indians, Nes Perses, Cayuses, Walla Wallas, Yakamas, Dalles Indians and others on the Columbia above were assembled.

After the pipe had been smoked sometime, Gov. Stevens said:

"My Children: Before entering upon the council we must have good and faithful interpreters. We want men who will state truly and exactly all that is said; we want men that you know to be good men; men that you can trust; we want no others.

We propose as interpreters for the Nes Perses, William Craig, this man, (pointing to Mr. Craig) who has longer lived with you, also McDauphin and Delaware Jim.

For the Cayuses Mr. Pembrom and Mr. Olney.

For the Walla Wallas and Yakamas, John Whitford.

Thus for each language we propose to have two and three interpreters. Now I ask you, do you want others added to the number? Are you satisfied with these men? If you have any others you wish to propose, speak out, for we wish you to be satisfied.

Stachus, a Cayuse said: We know of no others whom we would wish. There may be some words hard for them to make us understand, but we think the arrangement good as it is.

Gov. Stevens said: When you cannot understand what we say to you, stop us and we will repeat it.

Each interpreter will now be sworn to be a faithful interpreter.

Gov. Stevens then administered to the interpreters the following oath.

You solemly swear in the presence of almighty God, that you will well and truly interpret to the best of your ability what may be said by the Commissioners for the United States holding this council on the one part; and the cheifs and head men of the tribes and bands of Indians here present on the other part. So help you God.

Gov. Stevens then said: My children, the interpreters have each taken a solemn oath on the presence of Almighty God, to be true and faithful interpreters. I will now read the form of the oath. (and it was read as above).

Gov. Stevens continued: My children; I have much to say to you; my brother here Gen'l Palmer will have much to say to you. We want you to listen and be comfortable at the same time. We want clear skies, we want the ground to be dry. We will meet tomorrow with a clear sun and the day before us. Then we will open the whole subject, and will see if our hearts and your hearts will not come together.

We have met as friends today, tomorrow we will meet as friends and then enter upon our business. I therefore adjourn the council till 10 o'clock a.m. tomorrow. The weather is rainy and bad, tomorrow we hope the skies will be clear and you will all be able to be present. Should it rain tomorrow we will meet when it clears up.

One word on another point, you have come here by our invitation and are our guests. I have entered, and so has my friend here Gen'l Palmer, many an Indian

lodge, and they always gave us to eat and drink. We therefore have brought provisions which we offer to you as a friend to a guest; and we therefore trust you will all feel free to receive the provisions we have brought to furnish you with as our guests.

I propose to the Walla Wallas, Cayuses and Yakamas that you take two oxen, drive to your camp and slaughter for yourselves.

Young Cheif replied: We have plenty of cattle, they are close to our camp. We have already killed three and have plenty of provisions.

Gov. Stevens said: We are much pleased to hear you are so well provided for, but we have plenty of provisions and you are welcome to them.

Young Cheif replied: We have plenty at present. We do not throw away your offer. If we want any we will come to you.

Gen'l Palmer (to the interpreter): Say to the Yakamas: You have come a long ways. You may not have provisions. If you want any we have them and you are welcome.

Young Cheif said: Cam-i-ah-kun is supplied at our camp.

Gov. Stevens said: There will be no more said today unless you wish to say something.

Young Cheif said: We have nothing to say today; the weather is bad, rainy. We do not throw away your offer; when we are done talking you will know our hearts. We will talk slow not all in one day. No snow falls at this

season of the year. There will be time for you to go anywhere you wish.

The council then broke up and nearly all the Indians returned to their camps.

Pee-o-pee-mox-a-mox and Cam-i-ah-kun dined with the Commissioners and remained in their tent sometime smoking in a friendly manner.

Timothy, a Nes Perses cheif acted as crier for his nation and he will also record in their language the full proceedings each day of the council and this will be preserved among the archives of the nation and handed down to future generations.

May 30th, Wednesday.

At 1 o'clock P.M. the Indians began to assemble and at 1 3/4 P.M. the Council opened. Present same as yesterday.

Gen'l Palmer Said, My friends. I am glad to see so may of you here today. Yesterday the council was organized and Interpreters sworn to repeat to you what we say. To day my brother in Council will speak to you the great desire that our Chief has to promote your good.

I know that our Great Chief has a good heart. I know that my brother Gov. Stevens has a good heart, that they both desire to do and act for your good. I hope then you have come here with good hearts to listen to what he has to say. We both come here to talk to you as men and not as boys; we throw behind us everything that is bad, and come to you with one heart: we hope you have done the same: You are men able to judge between good

and bad: and when my brother speaks to you, you can judge whether it be good or bad.

For the present I am done, and my brother will speak to you.

Gov. Stevens Said. My Children: The sky is clear, the ground is dry, my heart is glad to day. Our hearts are glad. You are men: You have families: You have the means to live.

You have all of you been friends to me and mine; Two years since I came along you; Two years only have I know you; I came from the great waters beyond the mountains, across the mountains, and you have all been friends to me.

The Nes Perses. Lawyer fed my men driven out of the mountains by the snow: the Cayuses and Walla Wallas received my men kindly; Pee-o-pee-mox-a-mox saw us in his country and gave us guides: the young cheif and his people had nothing but smiles and kindness for us; and yesterday Cam-i-ah-kun showed me a paper from Capt. McClelland saying that he furnished guides and welcomed them on their way.

So to the North and East; there sits a Flat Head and there a Coeur D'lane on the route across the Bitter Root; there are Poulouses and Colvilles and Spokanes away to the North; there are also men from both sides the river, from far down; all were kind, and I brought a message to all, from a tribe beyond the mountains: I have been among the Black-feet and have brought word that they would meet you in Council, and that war should cease.

I met you in the trail, I saw your people in the Buffalo country: I met your people on the road to the Buffalo country: My heart said peace in the Buffalo country, peace here; peace is here now: peace between yourselves, peace between us. So for your kindness to me I am your friend, and I came from the Great Father to be your friend.

The interpreters yesterday took a solemn oath to speak truly. I took a solemn oath and my brother took a solemn oath to be your friends.

The Great Father has learned much of you. He first learned of you from Lewis & Clarke; Pee-o-pee-mox-a-mox remembers Lewis & Clarke, the Lawyer does: they came through your country finding friends and meeting no enemies.

I went back to the Great Father last year to say that you had been good, you had been kind, he must do something for you. My brother wrote to the Great Father in like manner.

He told the Great Father, these men have farms; the Great Father said I want them to have more and larger farms; I told him you had cattle and horses; he answered that he wanted your horses and cattle to increase: I told him some of your grown people could read and write: He answered, I want all the grown people and all the children to learn to read and write; I told him that some of you were handy at trades; he answered, that he desired to give all who choose the means to learn those trades;

Why did the Great Father answer in this way? Why did he send my brother and myself here this day, to say this to you? Because you are his children; his red

children are as dear to him as his white children; his red children are men, they have hearts, they have sense; they feel kindness, they resent injury: we want kindness on the one side and kindness on the other: We want no injuries to resent.

The Great Father has been for many years caring for his red children across the mountains; there (pointing East) many treaties have been made. Many councils have been held; and there it had been found that with farms and with schools and with shops and with laws the red man could be protected.

Why do I say laws? What has made trouble between the white man and the red man? Did Lewis and Clark make trouble? they came from the Great Father; did I and mine make trouble? No! but the trouble had been made generally by bad white men and the Great Father knows it, hence laws.

The Great Father therefore desires to make arrangements so you can be protected from these bad white men, and so they can be punished for their misdeeds; and the Great Father expects you will treat his white children as he will make a law they shall treat you. We are now in council to see if we can arrange the terms which will carry this into effect.

Let us go back to old times across the mountains and see what was there done: the red man received the white man gladly; but after a while difficulties arose; the blood of the red man was spilled and the blood of the white man; there was cold; there was hunger; there was death. But a man came, William Penn, and said I will see if my white children and my red children cannot be friends, and they were friends: Wm Penn and

the Indians came together as we now come together; they made a Treaty; there was peace; and no white mans blood and no red mans blood had been shed, and there has been peace to this day; this was in olden times.

Oh! these people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were but few whites, did not work well when there were many. It was found that when the white man and the red man lived together on the same ground, the white man got the advantages and the red man passed away.

The Great Fathers name at that time was Andrew Jackson: he said I will take the red man across a great river into a fine country where I can take care of them; they have been there twenty years; they have their government, they have their schools, they have their own laws; their Cheif John Ross knows as much as my brother or myself and a great deal more; he is what you call a Lawyer: he is an Indian, a Cherokee. When he goes to see the Great Father, the President, he sits with him at table as you sit with us at table.

Before you met my brother and myself in council, you have your own council; and the Great Father when he acts has his council also, he has his cheifs.

When I saw the Great Father he called his cheifs together, and had a council about you. He has two cheifs who have the care of the red men, their names are Gen'l Orr and Robert Johnson, I want you to remember them. Robert Johnson lives near John Ross; they both told me that what had been done for John

Ross should be done for you, and more, as I will tell you.

As we grow older we learn more and grow wiser; so of the Great Father and his cheifs; they did much for John Ross and his people twenty years ago; they have learned much since and know better what to do; they find one thing however the same now as then.

They gave John Ross and his people a tract of land into which no white man could go without their consent; they sent them an agent, they had schools, they had mills, they had shops, they had teachers, they had farmers, they had doctors. I repeat again no white man could go there unless the red man consented to it.

North of that tract of land the whites are going in but they cannot enter it; South of that tract of land the whites are going in but they cannot enter it; that tract of land is the Indians home; his home and the home of his children.

There are other tracts of land East of the mountains set apart for the red mans home; for there are many tribes. Those tracts the white man cannot enter without the consent of the red man. On all these tracts the red man has schools and farms and mills: they have teachers and physicians and an agent.

Now listen carefully: On these tracts the land was all in common: there were one or more larger fields for the tribes but no man had his special field: the Great Father and his cheifs now think that is not good: the Great Father said, the white man has his farm, his cattle and his horses; the red man shall have his farm his cattle and his horses; the Great Father says that

when on that tract of land an Indian has his field, that field should be his.

This brings us now to the question. What shall we do at this council? We want you and ourselves to agree upon tracts of land where you will live; in these tracts of land we want each man who will work to have his own land, his own horses, his own cattle, and his own home for himself and his children.

On each tract we want an agent to live who shall be your brother, and who shall protect you from bad white men. I shall speak more of this subject by and by.

On each tract we wish to have one or more schools: we want on each tract one or more blacksmiths. one or more carpenters; one or more farmers: we want you and your children to learn to make ploughs, to learn to make wagons, and every thing which you need in your house. We want your women and your daughters to spin, and weave and to make clothes. We want to do this for a certain number of years.

Then you the men will be farmers and mechanics, or you will be doctors and lawyers like white men; your women and your daughters will then teach their children, those who come after them to spin, to weave, to knit, to sew, and all the work of the house and lodges, you will have your own teachers, your own farmers, blacksmiths, wheelwrights and mechanics: besides this we want on each tract a saw mill and a grist mill.

Now we want you to agree with us to such a state of things; You to have your tract with all these things; the rest to be the Great Father's for his white children.

Besides all these things, these shops, these mills and these schools which I have mentioned; we must pay you for the land which you give to the Great Father; these schools and mills and shops, are only a portion of payment. We want besides to agree with you for a fair sum to be given for your lands, to be paid through a term of years as are your schools and your shops.

Now these payments are something you will have to think much about. Whatever is done is done with your free consent; I have more to say about these payments, about the agent, and about your doing better, as I think you will if we can agree.

I am tired of speaking; you are tired of listening. I will speak tomorrow. My brother will now say a few words to you.

Gen'l Palmer Said, I shall say but little to you today; it is not expected we can come together with one day's talk; nor do we expect you can understand with what has been said all that we want. You will not make up your mind until you hear all we have to say.

Tomorrow my brother will say something more to you; when he is through then I will speak to you. Sometimes when people have a matter to settle they commence way off; but as they understand each other they come together. With us, if we commenced way off, I hope we are a little nearer now, and by and by I hope we shall come quite together.

As we expect your are tired sitting, and as we do not wish to say too much at once, we will speak no more.

We will meet tomorrow if you like, at an earlier hour say 10 A.M. and you can come without our sending for

you. If any present wish to say anything, we are ready to listen to it.

No reply was made by the Indians and the Council then adjourned as 4 1/2 P.M.

May 31st. Thursday.

The Indians assembled at 11 1/2 A.M. and at 12 M. the council commenced.

Gov. Stevens Said, My children. I said to you yesterday we want you to agree to live on tracts of land, which shall be your own and your childrens; we want you to sell the land you do not need to your Great Father; we want you to agree with us upon the payments for these lands; we want you to have schools and mills and shops and farms; we want you to have teachers and millwrights and farmers and artisans; we want your people to learn to read and write; your men and boys to be farmers or millwrights or mechanics, or to be of some profession as a lawyer or a doctor. We want your wives and daughters to learn to spin and to weave and to make clothes and all the labor of the house; this for a number of years as we may agree.

I said yesterday this would only be a part of the payment. We want also for a certain number of years to furnish you with some clothing, clothing for your men, your women and your children.

I will mention only some of the principal articles; there will be blankets and cloth for leggings, clothes made, shirts and other articles for the men and boys; there will also be blankets and shawls and calicos and shirting and other articles for the women and girls. The

particular articles however will be agreed upon between yourselves each year; you may want certain articles one year, and different articles the next.

Besides clothing we would wish to furnish you with tools and implements for the shops; for the blacksmith; for the wheelwright, for the tin-smith and such other tools as you might need; we also want to provide you with tools for your farms, with ploughs and hoes and shovels and when you get further advanced with reapers and all the implements the white man has; we want in your houses plates and cups and brass and tin kettles; frying pans to cook your meat and bake ovens to bake your bread, like white people.

I have told you about the mill to grind wheat and corn, and about the mill to saw boards and lumber, and that we should employ carpenters in your service.

We want you by and by to live in houses and we shall furnish you with a mill to saw lumber, and with carpenters, and your own people by and by will become carpenters and then you will have houses; all this for a term of years. Then we hope that all you people, every family will have its farm, its cattle, its horses, and I trust, its sheep; then I said you will have your own teachers and your own schools; you will have your own smiths, your own wheelwrights, your own carpenters, your own physicians and lawyers and other learned men.

I told you of John Ross. As your fathers and your friends we think this will be good for you.

In thinking over the matter we want you to bear in mind what you have seen and what you know. That venerable old man Jim recollects when he first saw a

house in this country; you all of you recollect when you first saw cattle, now you count your horses and your cattle by thousands.

The horse carries you wither you wish to go, yourself, your wife, your children; and your packs, and he works in your fields; your cattle now furnish you with a portion of your food; your cows furnish you with milk and you already know how to make butter; we trust you will make butter and cheese, and that your women will all have churns. Formerly you raised no wheat, no potatoes. Now you have both grain and vegetables. Is not this a great change? A change which you all have seen? Has it not been for your good?

Let us look at it now in a different way. My brother said yesterday he would have much to say today.

We do not want you to agree not to get roots and berries, and not to go off to the Buffalo; we want you to have your roots and to get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there. What has disturbed you on these plains? The Blackfeet tribe of Indians who stole your horses and murdered your grown people and your children; we want that to cease forever.

The Blackfeet are not all bad people; they have some good cheifs among them and some good men; a part of them promised me two years ago not to make war upon you, and those have kept their promise; I could not see all, and those I could not see have since given trouble. But I left with them a man who spent a whole year with them; a man whom you have seen here; a man who writes at that table. He traveled all trough their

country, sometimes alone sometimes with two or three men; he saw them all, he talked to them about you, and they promised to meet you in council this year and make peace with you, to murder no longer your people, to steal no longer your horses.

The Blackfeet have now begun to think, if we stop stealing horses from the Indians this side of the mountains, what will become of our bands of horses? They will pass away. Raise your own horses says Mr. Doty as do the Flat Heads, the Nes Perses, the Cayuses, the Walla Wallas, the Coeur D'lanes, the Spokanes, the Yakamas and so back to the Flat Heads again. The Blackfeet then said, the Buffalo are not as plenty as formerly, we have to cut too many old bulls.

Mr. Doty then talked about you, said you had your fields, horses and cattle, and raised your own milk, meat and vegetables; the Blackfeet then said we too would like to have farms; we would like to have cattle and milk and bread.

The Blackfeet and other tribes who live in the Buffalo country, see that the Buffalo cannot subsist there forever; they feel that unless they change their mode of life, they will soon pass away.

They desire to change their mode of life. We shall help them provided they agree not to molest you.

When you see the Blackfeet at the Council they will ask you many questions, they will want you to tell them when you first had horses and cattle, and when you first had crops. If we agree at this council they will ask you all about that; and you will tell them you have not as much game as you once had, and the time is coming when you will not have dressed skins for your clothing;

you will tell them the Buffalo is passing away, and the time will come when we will not have robes for our tents and lodges; we have already changed and found it for our good, and we are determined to make another change in good season; we have made a bargain with the Great Father; we will have instead of tents of lodge skin when there are no Buffalo, houses of boards and of lumber; when the elk and the deer and the buffalo pass away, then we will have clothing, every man and woman and child like the white man; we have enough now to do to get roots and game and berries for our children; but we intend then to raise enough for our women and children, when their number have increased, and roots and berries and game are no longer to be found.

If we can agree here, this you will be able to say to the Blackfeet, and the Blackfeet will say, we will cut old bulls no longer, we will not starve, we will not die of cold, we will do as you have done, we will be friends, we will chase the Buffalo together on the plains, we will be friends forever.

I have spoken of an agent, I will speak more. If we agree at the council to have many things to do for you; the agent will live with you and see that it is done; if you think we have not done our part, go to the agent and tell him so, and he will see that we do it. If we think you have not done your part the agent will go to the cheifs and say so frankly and arrange it with them; he will be your elder brother, and will see that you are not wronged, and that the bargain is carried out.

I have much more in my heart to say but not now, there will be time enough by and by; my brother Gen'l Palmer has to speak, he is your friend as I am but he

has known you longer, and he can speak to you better than myself; he feels for you and you will find that every word which he says comes from a desire to serve you.

If you wish to hear him now he is ready to speak.

Gen'l Palmer Said. My friends, I do not wish to tire your patience too long, I have something to say to you, if you will listen a little longer I will speak.

My brother here speaks truly, when he says I desire to speak and act for your good.

In order to explain more fully the course pursued by the government towards the Indians on the other side of the mountains I will tell you of it; my brother here has reference to that subject and I may perhaps have to repeat his words.

He has told you something about our first settlements among the Indians over the mountains; those settlements were made over three hundred and sixty years ago. First came a cheif with several of his brethren in three ships across the ocean, they found many Indians in that country who received them kindly, they gave to them food and received in return beads and various trinkets; that cheif after traveling over a great extent of country and visiting many vilages left a part of his people and returned home.

After having been absent some time he returned with many others, upon arriving at the point where he had left his children none could be found. After the Cheif left, these people began to quarrel among themselves and with the Indians.

There were many causes for this; a portion of the Indians whose hearts were not good, stole the property belonging to these people; the whites retaliated by whipping and ill treating them. That was the first offense on the part of the Indians; the whites had long been without women and they often took forcibly the women of the Indians; this induced them on their part to retaliate; these difficulties continued from bad to worse until finally there was war; our people were but few, the Indians many; our people were all killed; there were also many Indians killed. Upon seeing our Cheif return with his vessel and other vessels and so many people they fled; they knew they had done wrong as well as the whites, and they expected they would be punished for it; this time our cheifs brot' with them their women and children and cattle and horses, and tools to work with.

The Indians seeing they were not interfering with them returned and for a while they lived together in peace; but they lived indiscriminately together, a white man here and an Indian there; but they could not long live this; their customs and mode of life was different, they did not understand each other; they continued a number of years with little difficulties occurring, occasionally killing one another until it finally broke out with another war; peace would sometimes be made and last for a little time, but finally they would get foolish and their hearts would get bad; as it is said in this country sometimes; in this part of the country by the young men they are few and we are many let us wipe them out.

They finally made war, a council was held, speeches and harangues were made and they declared war, a few

white men were killed and many Indians were killed; there were more Indians killed than white men because we had better arms and know how to make them. This war continued some time but finally they had peace; the whites brought with them and made after they arrived here whiskey; this the Indians were very fond of and like all other persons after drinking it were foolish; they quarreled among themselves and killed each other and some whites in their drunken frolics; our cheif saw this condition and desired to do them good; he saw that the Indians and the white man could not live peaceably together: he called the Indians together in council; he proposed as we propose in this council, to purchase their country and select a place for them to live; he proposed to have a district of country set aside for the Indians to live in that no white man should live there; but the Indians said No! why should we leave the bones of our fathers and go to a strange land; we have plenty of elk, deer, bear, berries, and roots; we like you let us live together, we don't want to cultivate the soil you are welcome to occupy it; they were told that the wild game, the roots and the berries would not last always; they said they were a great and numerous people, they knew what was best for them and did not want our counsel; they quit talking, the whites went to their houses and Indians to their lodges; our people continued coming; every year vessels came until our people got as numerous as the leaves on the trees.

It was but a few years before their game was all killed off; for the white man killed the game as well as the Indians; the Indians had no food in his lodges, the women and children were hungry; at last they commenced stealing our peoples property and

plundering their houses; our people were forced to retaliate by whipping and shooting some of them. The Indians again sent messengers to the surrounding tribes to call them to make war; they resolved in council to exterminate the whites, kill them off; they commenced by burning houses, murdering women and children, and killed a good many of our people; finally our warriors were collected and they had war; they did not understand our mode of warfare and thousands of Indians were killed and but a few of our people were killed in the battles. This continued for a long time and the tribes finally concluded they had been acting foolish, and that they would receive the talk of our cheif.

Those that were left finally agreed to meet our cheif in council; they did so and there was peace. In that council it was agreed by the Indians that they would reside on a certain district, set aside for them certain limits, certain bounds; they agreed in that council to live in peace with the whites, and to commit no depredations on them, and to live at peace with other tribes; our cheif agreed that we would build them mills, black smith shops, carpenters shops and supply them with all necessary fixtures.

Our cheif directed his agents to build those mills and school houses and shops, and he employed teachers and smiths and millers and sent them among them. They supplied them with cattle and horses and oxen and ploughs and waggons and every variety of farming tools.

These Indians then began to see that they had acted very foolish, and that when they supposed they knew enough for them and did not want any of our counsel,

they knew nothing, they were as blind men; they have since been learning and continued to learn and prosper, and are now a great happy and good people; there were a few tribes who refused to go into that council, who refused to treat. What was the condition of that people? Those who thought themselves very wise and refused to take the advice of the white people those who continued to make war upon our people? Their game was all killed, they had nothing to eat, they fled to the mountains then they continued to live but a few years of miserable existence, until they were finally overtaken by more powerful tribes and all killed. There were other tribes in other districts of country, who heeded the advice of the cheif and were set aside in districts of country belonging to themselves.

In all cases where they have entered into a treaty and agreed to reside upon tracts set apart for them our cheif has aided them. All who have settled upon these tracts have not done well, for are lazy and have foolishly thrown away what has been paid them.

But you as a people know how to appreciate these advantages and would not throw them away; all experience we have had with Indians these Three hundred and sixty years shows us that the white man and the red man cannot live happily together; although we may live near together there should be a line of distinction drawn so that the Indians may know where his land is and the white man where his land is; you are all able to judge for yourselves by the constant difficulties that are occuring here among you, between the whites and the Indians.

We have some people whose hearts are bad, who violate our laws; we have men who are afraid to live in the

settlements, they seek opportunities to go among people at a distance, among the Indians; as an evidence of that I need only refer to matters that have transpired within the past four weeks in your own country; a few men had formed a plot by which they were to get your horses: their plan was this: part of those men went over into your bands and if they found any horse branded took a description of it, wrote it down in a book; when they had visited all your bands and got the description they would go away. Sometime after they would take their book and give one of their party a description of these horses and an order to get them; when they gather up all these horses they will drive them off to the Grande Ronde or some place in the Blue Mountains; they contemplate when they had got the stray horses coming back and driving all your horses to Salt Lake; but a short time ago Mr. Thompson came up and learned the trick: he went below and took out a warrant for them and these soldiers came up to try to arrest them.

It is these men I am told who would rob you of your property, who are giving you advice not to treat with us; whose counsels do you prefer to take? These men who would rob you, or ours who come to befriend you? These men who came here are strangers to you with smooth tongues, they care nothing about the truth. I don't mean to say that all who come among you are bad men; I am afraid there are a few of these young men who come to live among you and wish to get your women, not because they desire your women but because they want your horses; they will come and remain among you a few years, get a woman and raise children, but when they get a band of horses around them, they will be off and leave the women and

children without anything; I have been told that one of these men has been in your camp since we have been holding this council, advising you to have nothing to do with us; these men you cannot tell always who they are, but all such men need watching; you will now be able to judge who are your friends, such men, or myself and my brother who have come here to act for your good.

We have been talking a good while and you have been listening. You are tired sitting. I have more to say to you but I will leave it till tomorrow and say no more at present.

The Council then adjourned at 3 1/2 P. M.

In the evening the Young Cheif sent a message to the Commissioners to the effect that he should be pleased if no council should be held tomorrow, as his people desired to make a great Feast and have a general holiday. To which request the Commissioners acceded.

Lawyer, Pee-o-pee-mox-a-mox, Young Cheif and Cam-i-ah-kun dined at Gov. Stevens table with Gen'l Palmer and the gentlemen of the party.

June 1st. Friday.

All about the Treaty Ground was very quiet, all the principal Cheifs dined at Gov. Stevens table.

The day was extremely warm and to have held a council would have been most uncomfortable.

June 2nd. Saturday.

The Indians began to collect at 11 1/2 A.M. Some delay was occasioned by the non appearance of Cam-i-ah-kun and Ow-hi. But at 12 M. all the cheifs being present the council opened.

Gen'l Palmer Said. My friends, we have met here today to continue the talk; I shall try and speak so that you may understand me.

I have said that the white man and the Indians could not long live together in peace, a few may do so, but where there are many we cannot do it. If your Cheifs are unable to restrain your people where there are but few, how can our Cheif prevent his people from doing wrong when they are so many and scattered over so large an extent of country.

It is but fifty years since the first white man came among you, those were Lewis and Clark who came down the Big River - the Columbia. Next came Mr. Hunt and his party, then came the Hudson Bay Co. who were traders. Next came missionaries; these were followed by emegrants with waggons across the plains; and now we have a good many settlers in the country below you.

If there were no other whites coming into the country we might get along in peace; You may ask, why do they come? Can you stop the waters of the Columbia river from flowing on its course? Can you prevent the wind from blowing? Can you prevent the rain from falling? Can you prevent the whites from coming? You are answered No! Like the grasshoppers on the plains; some years there will be more come than others, you cannot stop them. Our cheif cannot stop them, we

cannot stop them; they say this land was not made for you alone, the air that we breathe, the water that we drink, was made for all. The fish that come up the rivers, and the beasts that roam through the forests and the plains, and the fowls of the air, were alike made for the white man and the red man.

Who can say that this is mine and that is yours? The white man will come to enjoy these blessings with you; what shall we do to protect you and preserve peace? There are but few whites here now, there will be many, let us like wise men, act so as to prevent trouble.

And now while there is room to select for you a home where there are no white men living let us do so. I have made treaties with all the Indians tribes in the Willamette Valley, with all in the Umqua Valley, with all in the Rogue River and Shasta country; they have agreed to remove to such tracts as shall be selected for them; they have agreed to be friendly with the whites and all other Indians; they have sold us all their country except the reservations; we have agreed to build them mills, blacksmith shops, waggon makers shop, to erect a tin shop and gun smith shop, to build a school house and hospital, to employ millers, mechanics, school teachers, doctors and farmers, all these expenses to be paid by the government for twenty years.

Do you want these things: Do you want a saw mill to saw the timber to build your houses? You have a few lodges now, how long will they last? By and by where will you get your hides to make lodges? Gov. Stevens told you that the Blackfeet said the Buffalo were not as plenty as they were once; it is but a few years since there were a plenty of Buffalo at Fort Hall. Mr. Craig

here has seen many of them there and probably others of you have; where are they now? all gone;

Do you want mills to grind your wheat and your corn? Do you want blacksmiths to make your ploughs and harrows? To make your axes, hatchets, hoes, knives, and to shoe your horses? Do you want a gun-smith to mend your guns when broken?: Do you want a tinner to mend your kittles, your pans and cups? Do you want a carpenter to build your houses and a waggon maker to make your waggons? Do you want a shoe maker to make your boots & shoes? Do you want a doctor to attend to the sick and give them proper medicines? Do you want farmers to assist you and show you how to raise wheat, corn and potatoes? Do you want school teachers to teach your children how to read and write? Is it not good that these men can write down what is said here and understand what it is? It would make my heart glad if you could all do so. It would make my brother's heart glad if you could all do so; would it not be good if you wanted to talk with my brother, or if you wanted to talk with our Great Chief? If you knew how to write and wanted to talk you could send it to him on paper and he would know your heart: would it not be good then to have schools among you?

Do you want to have plenty of provisions for your women and children? Do you want to have plenty of blankets and clothing? The deer skin and the elk skin cannot always be had to make your clothing; do you always want to live at peace with all persons? If you want all these things we are ready to give them to you; when we know your hearts then we shall know whether you want these things or not.

You have often been told that by and by our Great Cheif would send some person to buy your country. I suppose you have been looking for that person a long time; Dr. White came here. What did he do? He may have talked very well to you but what use? Mr. Wampool came, what did he do for you? My brother and myself have come, we have not only come to talk but to do something. Will you receive it or will you throw it behind you? We did not come here to scare you or to drive you away, but we came here to talk to you like men, and to make such arrangements as to preserve peace and protect you. Our agents have tried to protect you in all your rights: but I am fearful they will not always be able to do so, if you continue to live in this scattered condition.

I see here a good many old people. I expect you have left a good many of your old people at home; we want to do them some good while they yet live, and if you enter into a treaty with us we can then do them some good and do you all good; if we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place? My heart is that it is better for you to enter into a treaty now with us. I know that my brother has a good heart and wants to do you good, but we do not know how long we can act for you. Perhaps it may not be long before other agents will come; the next that come may not have such good hearts and do as much for you as we will.

If we make a treaty with you and our Great Cheif and his council approves it, you can rely on all its provisions being carried out strictly. My heart is that it is wise for you to do so. I will not speak any longer.

Gov. Stevens Said. My Children, my brother and myself have opened our hearts to you, we want you to open your hearts to us.

Five Crows Said, we are tired.

Gen'l Palmer Said. We are not expecting to say any more today.

Five Crows Said. I have a little to say. Do you speak true that you call me brother? We have but one Father in Heaven; it is He /pointing above/ who has made all the earth; He made us of earth on this earth: He made our Fathers; when he gave us this earth. He gave no gardens also.

He created our Fathers when he created Adam; we were divided into different countries; It was He, the Almighty that passed the law; you must do no evil, you must not steal, you shall not take any thing without payment; the Great Father says he will send the thief into fire - into hell -

The Commissioners said will you speak now or on Monday?

Pee-o-pee-mox-a-mox Said. Why not speak tomorrow as well as today? We have listened to all you have to say, and we desire you should listen when any Indian speaks. It appears that Craig knows the hearts of his people, that the whole has been prearranged in the hearts of the Indians; that he wants an answer immediately without giving them time to think; that the Indians have had nothing to say so far it would appear that we have no cheif.

I know the value of your speech from having experienced the same in California, having seen treaties there. We have not seen in a true light the object of your speeches; as if there was a post set between us, as if my heart cried from what you have said; as if the Almighty came down upon us here this day; as if He would say, What are you saying? Look at yourselves your flesh is white mine is different, mine looks poor; our languages are different. If you would speak straight then I would think you spoke well; we have come together to speak about the earth and not of God; you were not afraid of the Devil!

You see this earth that we are sitting on; this country is small in all directions. Why should you fear to speak on Sunday? Should I speak to you of things that have been long ago as you have done? The whites made me do what they pleased, they told me to do this and that and I did it; they used to make our women to smoke; I suppose then they did what was right: when they told me to dance with all these motions that are here then I danced. From that time all the Indians became proud, and called themselves cheifs.

On another subject I have something else to say. Now how are we here as a post? From what you have said I think you intend to win our country, or how is it to be? In one day the Americans become as numerous as the grass; this I learned in California; I know that is not right. You have spoken in a round about way; speak straight. I have ears to hear you and here is my heart. Suppose you show me goods shall I run up and take them? That is the way we are, we Indians, as you know us. Goods and the Earth are not equal; goods are for

using on the Earth. I do not know where they have given lands for goods.

We require time to think, quietly, slowly. I see Americans in all countries, it is not the country to think about, we may think about another; there is the Mission /Catholic Mission/ it is right there and it is right it should be there. You have spoken in a manner partly tending to Evil. Speak plain to us. I am a poor Indian, show me charity; if there was a cheif among the Nes Perses or Cayuses, if they saw evil done they would put a stop to it and all would be quiet; Such cheifs I hope Gov. Stevens and Gen'l Palmer are. I should feel very much ashamed if the Americans should do anything wrong. I had but a little to say, that is all. I do not wish you to reply today, think over what I have said.

Cos-os-pi-lo- Said in substance as follows, it was addressed to his people and rendered by the Interpreters after the conclusion of his speech.

He reproved the young men for laughing and talking: said they considered him of no account any longer; they had knocked off his horns and his teeth were worn out; once he had horns and he could hook; teeth and they were sharp and he could bite; you young men think yourselves very smart by and by you will learn; now I am tired of your conduct; I am not speaking to Gov. Stevens or Gen'l Palmer, I am speaking to you young men, as my children, to listen and behave yourselves.

Gov. Stevens Said. We are ready to hear, my friends anything you have to say today. If you desire not to speak today the council will adjourn till Monday. We do not wish to speak on Sunday because our Great Cheif

does not want us to do business on that day, unless it is a matter of necessity. We think that most of our red brethren do not wish to do business on Sunday. The Council is adjourned till Monday at 10 A.M.

And the Indians then dispersed at 3 P.M.

June 4th at 12 1/2 P.M. the Indians began to collect and 1 1/2 P.M. the council opened.

Gov. Stevens Said. Pee-o-pee-mox-a-mox said on Saturday, he had listened patiently to all we had said, and hoped we would listen patiently when any Indian spoke. We listened patiently on Saturday, we shall listen patiently today; we want you to open your hearts and speak freely.

After a long pause the Lawyer said. If you will designate some one to speak first he will speak. If you do not they will sit here all day without speaking.

Gov. Stevens Said. We expect the Head Cheifs know the hearts of their people. We will be glad to hear the Lawyer speak.

The Lawyer said. My cheifs and people, I will now speak, listen (to Commissioners) I ask good for these poor people; I think my cheif about what you have been speaking; It is from the man that made us, My Cheif, or is it from your own people? that is the reason of my asking, where is it from you have spoken My Cheif? Although I think it is from the white people; from where the white people is they have been dying and dying, and are yet dying, and also the whites are living all from the same people. The same thing of our people our red people that are younger and from the same

root; and here you see these many of us yet and still living, old men and children.

The Supreme Being our maker listens to the white people who are dead and also to those who are living; the same thing with the red people, they listen to the dead and also the living.

And this what the President has made up his mind for us poor people; he has thought we were a poor people and says go and see them and learn them straight; and that is the reason you have told them you would learn them to read and write and all those other things you have spoken of; and that is the reason I have understood what you have spoken from the President; for that reason you have been asking us questions, and now we are asking questions from you.

It was not for nothing I have been listening to you. My country is poor it is a trifling country. You see the map the marks of our country, one stream runs one way another runs another way, it is all rock. My Cheif, but the Big Cheif from the light (the East) said to you go and talk to these people and you have done it, he says go there to take care of your white people and your red people and you have done it. As long as the Earth stands take care of the people; he said to the white people and the red people all as one let us listen to the laws, when the earth is done away with there is the end of the law, and that is the reason you see us good and we see you good.

My Cheif that is all I have to say at the present, there are a good many men here who wish to speak. Let them speak.

The Commissioners requested Pe-at-tan-at-tee-miner to speak, who replies. You have heard what I have to say. My mind is the same as the Lawyer has spoken. What I had to say he has said, he has spoken my mind, I have nothing to say, he has said all, for my land it is for you and for me. I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those what come that we are speaking. This is all I have to say at this present time.

Cam-i-ah-kun was invited to speak and said. I have something different to say than the others have said. It is young men who have spoken; I have been afraid of the white man, their doings are different from ours. Your cheifs are good, perhaps you have spoken straight, that your children will do what is right, let them do as they have promised. This is all I have to say.

Pee-o-pee-mox-a-mox was next invited and said I do not wish to speak. I leave it to the old men.

Gen'l Palmer Said. We do not know who of them desire to speak; let their old men speak if they desire to do so.

Gov. Stevens Said. If u-u-Sin-mull-e-cun would like to speak we would be glad to hear him. He replied. I do not wish to speak now let those who have already spoken speak. What the Lawyer has said is my heart, it is not necessary for me to speak.

The Commissioners called upon Staachas to speak who said, how is a cheifs language? How is the Big Cheif talk? Where has their talk sprung from? That they have spoken straight on the part of the Indians; the Lawyer although young has spoken well for me. Who is

it that is going to speak straight for all of us. Now I want the whites and the Indians to show all their hearts; you know and we all know life while we are living, and I ask you my friends to speak straight and plain to us, as if I spoke to the President I say Yes. I would wish that the President was here so that we might all listen to him; he would enlighten us, he would give us life, he would make us to live as we ought to live, we would give each other our hands to hold always.

Lawyer spoke first and he will have more to say about this we are now speaking of. Lawyer has asked you to speak plain. I make the same request. I have nothing more to say.

Pee-o-pee-mox-a-mox Said. I do not know what they (the interpreters) have said. My heart was heavy, my heart has to seperate so, that was my heart. I do not know for what lands they (the Interpreters) have spoken. If they had mentioned the lands that had spoken of then I should have understood them. Let it be as you propose, so the Indians have a place to live, a line as though it was fenced in, where no white man can go.

If you say it shall be so then all these Indians will say yes. Although that you have said the whites are like the wind: You cannot stop them, you make good what you have promised.

You have spoken for lands generally. You have not spoken of any particular ones, your words are here (at this place). If you spoke as the watch goes, then we would say yes; the manner in which you have addressed the whole of us has made my heart heavy. I

had nothing to say: I like you Americans; and I like the Hudson Bay Co. people by which means I am led this way and that way; I do not know as yet what lands these Indians have spoken for but when they mention the lands then I shall know.

Fah-hah-tsil-pilp or the Red Bear said: I am not ashamed of any of my friends, for why should I be ashamed? If there was something above that I should be ashamed of, then I should be ashamed; I am not ashamed of any people that are sitting around, we have spoken here with our brothers. This is the first time I have ever seen my brothers here.

I like your talk very much as I have heard it, and that is the reason I have listened to you well. And here where we see each other face to face we will talk straight. We shall know if you shall like my talk that I am now talking as I have like yours. I wonder if we shall both tell the truth to each other.

This is what I think my Brothers, that one time more we will talk, we will not say yes from what has yet been said.

Now my younger brother there will speak. Being thus called upon.

Tip-pee-il-lan-ah-cow-pook, or Eagle from the Light arose and said: Yes my friends you see where the Sun is. He hears me. It is from beyond where the Sun is that sent you here to talk.

The red people are put on this earth. A white man was sent on this earth from the Light (meaning the East). The red man was sent from the West, and now the big

cheif from the Light has sent his talk here to the red people.

The President has spoken to me throught you and I hear it. He likes us. He has fixed places for us to sit on and love one another. And I also like the white people as the President likes us.

On a road ready finished, he has sent you here. Look at the face of the earth, there is a road to travel on. Roads up the valleys and roads on to the end of the earth. From the time you started, you found a road till this time.

You are now come to join together the white man and the red men.

And why should I hide anything? I am going now to tell you a tale. I like the President's talk; I am glad of it when I hear it here and for that reason I am going to tell you a tale.

The time the first white men ever passed through this country, although the people of this country were blind, it was their heart to be friendly to them. Although they did not know what the white people said to them they answered yes, as if they were blind. They traveled about with the white people as if the people that said that had been lost, and those lost people said to them, yes.

I have been talked to by the French and by the Americans, and one says to me, go this way, and the other says go another way; and that is the reason I am lost between them.

A long time ago they hung my brother for no offence, and this I say to my brother here that he may think of it.

Afterwards came Spalding and Whitman. They advised us well and taught us well, very well. It was from the same source, the Light (the East). They had pity on us and we were pitied. And Spalding sent my Father to the East—the states—and he went. His body was never returned. He was sent to learn good counsel and friendship and many things. That is another thing to think of.

At the time, in this place here, when there was blood spilled on the ground, tho there was blood upon the earth we were friendly to the whites and they to us. At that time they found it out that we were friends to them. My Cheif, my own cheif said, I will try to settle all the bad matters with the whites and he started to look for counsel to straighten up matters; and there his body lies, beyond here. He has never returned.

At the time the Indians held a grand Council at Fort Laramie. I was with the Flatheads and I heard there would be a council this side, next year. We were asked to go and find counsel, friendship and good advice. Many of my people started and died in the country. Died hunting what was right. There was a good many started there on Green River, the small-pox killed all but one. They were going to find good counsel in the East; and here I am looking still for counsel, and to be taught what is best to be done.

And now look at my peoples' bodies scattered everywhere hunting for knowledge, hunting for someone to teach them to go straight.

And now I show it to you, and I want you to think of it. I am of a poor people.

A preacher came to us, Mr. Spalding. He talked to us to learn, and from that he turned to be a trader, as though there was two in one, one a preacher and the other a trader. He made a farm and raised grain and bought our stock, as though there was two in one; one a preacher the other a trader.

And now from the East has spoken and I have heard it. And I do not wish another preacher to come and be both a trader and preacher in one. A piece of ground for a preacher, big enough for his own use, is all that is necessary for him.

Look at that, it is the tale I had to tell you, and now I am going to hunt friendship and good advice.

We will come straight here– slowly, perhaps,–but we will come straight.

Gov. Stevens said: My brother, if any of you wish to speak today, I will still be silent. Is there anyone who wishes to speak now? If not, I will go on. We have listened to you carefully. We think we know your hearts.

You are willing to make a bargain. You want to know exactly the terms. We have promised mills, shops, schools, teachers, farmers, and all the other things for a term of years. You want to know how many years. We have promised you as the other part of the payment clothing for yourselves, your wives, and your children; tools and implements for your farms and shops and articles for your house.

You want to know how much clothing. How many implements and tools and articles for your farms, your shops, and your houses; and how many years will you have them?

Before I answer that, I will answer another question which you have asked me. You want to know where your Reservations are to be. What is the ground we have in view for you. I will explain this matter freely.

Here are the Nes Perses, Cayuses, Walla Wallas, Yakamas and Umatillas and bands on both sides the Great river to below the Dalles.

Tribes northwards: Colvilles, O-kin-a-kune, Palouse.

For the principal tribes here present, we have thought of two Reservations. One Reservation is the Nes Perses country and one in the Yakama country. The Reservation in the Nes Perses country, to extend from the Blue mountains to the spurs of the Bitter Root, and from the Palouse river to part way up the Grande Ronde and Salmon River.

On this Reservation we wish to place the Spokanes, the Cayuses, the Walla Wallas, as well as the Nes Perses, and also the Umatillas. That will be something for them to think about to see whether they can agree to it.

The Yakama Reservation to extend from the Attannun river--to include the valley of the Pisco river--and from the Yakama river to the Cascade Mountains. On this Reservation we wish to place the Colvilles, O-kin-a-kunes, Palouse, Pesquouse, Klit-a-tats, and the bands on the north side of the river below the Walla Wallas as far as the Kuth la poodle river, near the

Cowlitz. All these as well as the Yakamas on that Reservation.

There is a third Reservation East of Mr. Jeffersons which will be explained to you by Gen'l Palmer; there it is proposed to place the bands below the Umatillas.

We want you to think about this and see if you like it. You may think the Reservations are not good. If not you will say so. The Cayuses, the Walla Wallas, the Umatillas, may prefer the Yakama to the Nes Perses Reservation, and they may not like either.

I will give briefly the reason for selecting these two Reservations. We think they are large enough to furnish each man and each family with a farm, and grazing for all your animals. There is especially in winter grazing on each Reservation. There is plenty of Salmon on these Reservations, there are roots and berries. There is also some game. You will be near the Great Road and can take your horses and your cattle down the river and to the Sound to market.

Though near to the great roads, you are a little off from them, and you will not be liable to be troubled by travellers passing through.

We can better protect you from bad white men there. We can better prevent the trader and the preacher all in one man going there. We can better prevent bad men telling you to dance, and cheating you with lies. We can better stop the theif who comes to steal your horses. Your horses will be saved to you and there will be no theives to throw into hell-fire.

You may ask, why so many tribes on one Reservation, and how is it proper to place them on the Reservation?

We want as many tribes together as can be taken care of by one agent. We can do more with the same means; this is a matter I wish to explain fully, and also about the payment in clothing, etc., which I mentioned in the first part of what I said, I will speak no more today, but speak tomorrow. Think over what I have said and hear the rest tomorrow.

Gen'l Palmer said: I shall say nothing to you tonight. You have been sitting a long time and you are tired. We want you to come tomorrow morning early. We want you all to come. You have heard but part, we want you to hear the whole, and when you hear all I think you will say it is good. I have nothing more to say to night.

The Council then adjourned at 6 P. M.

June 5th, Tuesday.

The Indians began to collect at 11½ A.M. and at 12 M. the council opened.

Gov. Stevens said: My children, I stated yesterday that we wished to place you on two Reservations and that as regards the tribes below the Umatillas. There was a third Reservation which would be explained by my brother, Gen'l Palmer. I stated we wanted as many tribes as could be taken care of by one agent.

I will now explain this matter fore freely. We wish to put the Spokanes, the Nes Perces, the Walla Wallas, the Cayuse, the Umatillas on one Reservation in the Nes Perses country.

Here (showing a draft on a large scale) is a map of the Reservation. There is the Snake River. There is the Clear Water river. Here is the Salmon river. Here is

the Grande Ronde river. There is the Palouse river. There is the El-pow-wow-wee.

We commence where this river, the Palouse, comes from the mountains, and down the river to the mouth of the Ti-not-pan-up, then to the Snake river 10 miles below the mouth of the El-pow-wow-wee, then to the source of the El-pow-wow-wee, Thence along the crest of the Blue Mountains to the Grande River below the Grande Ronde, thence along the ridge between the Wall-low-low river crossing the Snake River 15 miles below the mouth of Powder river, thence to the salmon river a little above the crossing, thence by the spurs of the mountains to the source of the Palouse river at the place of beginning.

This is a large Reservation. The best fisheries on the Snake River are on it; there are the fisheries on the Grande Ronde river. There are fisheries on the Os-ker-wa-wee, and the other streams. There are cumash grounds here at this place (pointing to the large cumash grounds of the Nes Perses). We feel if we put you on this Reservation our agent can visit you all and take care of you all.

Each tribe will have its own place on the Reservation. The Spokanes will have their place and their home. The Nes Perses their place and their home. The Walla Wallas their place and their home. The Cayuse and the Umatillas their place and their home.

The Spokanes will have a blacksmith, a school, and a farmer. The Walla Wallas will have a blacksmith, a school, and a farmer. The Cayuse and Umatillas will have a blacksmith, a school, and a farmer. The Nes

Perses are more numerous, they will have two blacksmiths, two schools, and two farmers.

These schools are the first schools where your children will learn to read and write. The agent will live in some central place where there will be an agricultural and industrial school common to all the tribes. To this school all the tribes will send such of their children as wish to study more than in the first schools, and to learn trades. Here where the agent lives will be the tinner and the tin shop. There will be one for all the tribes. There will be the waggon maker and wheel right; there will be one for all the tribes.

For the four tribes there will be two saw-mills and two flouring mills in proper localities. Thus all the tribes will be on an even footing, and each will have the same provision made for them.

You will see that you will be better take care of all on one reservation; each tribe having its own place, than if the Spokanes were on one reservation with the whites all around them, the Nes Perses on one reservation with the whites all around them, the Cayuse and Umatillas on one reservation with the whites all around them.

Here (showing the map) you will be on one Reservation with equal rights under one Agent, and the same provisions for your welfare. But each tribe has its head cheif. A cheif takes care of his people. He people listen to him. He devotes his time, his very life to their good. We want you cheifs to be such men, we expect them to know about you and to see that we do our part. They will not work for themselves, they will work for you. We shall therefore give the Head Cheif of each tribe

Five Hundred Dollars a year for 20 years to be paid in cash.

We shall build for each Head Cheif a good house to live in. The Agent will have his house and he will be paid. The Head cheifs shall have their houses and be paid. They will all labor for the good of the Indians.

You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

My friends, I have held four councils on Puget Sound. I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have all agreed, should the President decide, to go on one Reservation. That Reservation is only about one fiftieth part as large as this; they have, however, few horses and cattle. They have not three hundred head. They take Salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more.

Now I will tell you the payments that will be made provided you are placed on one Reservation. If you go on different Reservations different provisions will be made. Well, you all go on one Reservation, Spokanes, Nes Perses, Walla Wallas, Cayuses and Umatillas; we shall spend a certain amount in moving you onto the Reservation, in breaking up and fencing your farms, in

building houses for your cheifs, your sub-cheifs and your people, in cooking utensils for your houses, in milk pans and churns, in a good supply of blankets and clothing. In all these things we will expend for you, One Hundred Thousand Dollars. This will be done the fist year you go on the Reservation.

Now, if any man gives up a tract of land in going onto the Reservation, he will have the same thing done for him that is done for all the rest and he will have, in addition, his improvements made good to him on the Reservation or the value of them paid to him in cash, as he may desire.

The other payments extend through twenty years. Two Hundred and Fifty Thousand Dollars. We do not want to spend this amount or much of it in cash, and I want my friend Pee-o-pee-mox-a-mox and the other cheifs to listen while I give the reason. I ask all the cheifs to hear my reasons and think of them.

We can furnish you with nearly twice as many good with the same amount of money as you can get from the Traders. We shall buy the things you want in New York and San Francisco at cheap rates and good articles. The expense of getting them to you will not come out of your money; it will cost you nothing. You now pay Eight or Nine Dollars for a blanket at Fort Walla Walla, we shall furnish you two such blankets for less than that sum, say from six to seven dollars. At Fort Walla Walla a flannel shirt costs three dollars, we will give you three shirts for three dollars. You pay for a calico shirt at Walla Walla one and a half and two dollars. We can furnish calico shirts for fifty cents a piece. If we furnish the goods therefore, you will get three blankets, three flannel shirts and three calico

shirts for the same money you now pay for one blanket, one flannel shirt, one calico shirt, and have to make a long journey for them besides. We can furnish four hoes for a dollar and a half. You know what you have to pay for a single hoe at Fort Walla Walla and the Dalles. We want the payments to do as much for your good as possible. We don't want half of it to go into the pockets of Traders.

I ask the cheifs to listen to me again.

There will be a certain sum each year for their people. We want them each year to consult their people and tell us what things they want. We want them to make out a list how many blankets they want and what kind of blankets, the number of flannel and calico shirts they want, and so for every article of clothing for their men, women and children. Also the tools they want for their farms, their house and their shops. In short we want the cheifs to tell us how they want the money spent. The list to be made out every summer for the pay of the next year. If you want part of the pay made in money, we want you to give the reasons and state the sum each year. We will send your reasons to the President and let him decide. There are many of you we would be willing to give a part of the payment in money, but not to men who drink whiskey, and not to the men who do not take care of their wives and children. Let, therefore, your cheifs each year make out a list of how much money and we will send it to the President.

I have now a few words to say in regard to the Yakama reservation; the same provisions as regards schools, farms, and shops will be made, as in the case of the Nez Perses Reservation.

Here is the Yakama Reservation, commencing with the mouth of the Attanum river, along the Attanum river to the cascade mountains, thence down the main chain of the Cascade mountains south of Mount Adams, thence along the Highlands separating the Pisco and the Sattass river from the rivers flowing into the Columbia, thence to the crossing of the Yakama below the main fisheries, then up the main Yakama to the Attanum where we began.

We propose to place there the Colvilles, the O-kin-a-kunes and Pisquouse Indians (they now send their cattle and horses there in winter), also the Bands on the Columbia River below the Walla Wallas down to the mouth of the Kuth la poodle river, also the Klicatat around Mount Adams and Mount St. Helens. These Klicatats and these bands on the Columbia originally came from here or further north.

We will give one blacksmith, one farmer and one school for the Covilles, one of each for the Pisquouse and O-kin-a-kunes, one of each for the Yakamas, one of each for the Yakamas including the Palouses, one of each for the remaining bands. They shall have the agricultural and industrial school as in the other Reservation. They shall have the same mechanics, gunsmith, tinsmith, plough and waggon makers. There children shall be taught and they shall learn trades like the children on the other Reservation. They shall have the same liberties outside the Reservation to pasture animals on land not occupied by whites, to kill game, to get berries and to go on the roads to market. Payments to be made in the same way as in the Nes Perses Reservation. One Hundred Thousand Dollars to

be expended the first year. Tow Hundred and Fifty Thousand Dollars, the next Twenty years.

I need say nothing more. It is designed to make the same provision for all the tribes and for each Indian of every tribe. The people of one tribe are as much the people of the Great Father as the people of another tribe; the red men are as much his children as the white men.

We think this plan will be for your good. We want you to think of it. I have tried to talk plain and to speak straight out. My Brother will now speak

Gen'l Palmer Said. My Brothers, my brother here has said as much perhaps as should be said. He has told you what we desire to do for you; it is for you to say whether you will receive it or throw it away; we have but one heart; he has been speaking of something which interests you; it is the duty of your cheifs and your men to think well of it. It was said by this man (Young Cheif) the other day that we were not acting wholly for these that are here now, but for those who come after us; it is the duty of a parent to provide for his children. You may not understand all the advantages of the propositions that have been made to you; but they are for your benefit and those who come after you; as a cheif desiring to promote your interest, I say it is good; that I would not deceive you; the Great Spirit who knows the heart of all men knows that I desire to promote your good.

We expect it will take at least two years to prepare these reservations for you to go onto. If we make a bargain and sign the papers, my Brother and myself and all the Head Cheifs and Head men, that paper

must go to Washington. Our Cheif and his council will examine it; if they approve it they say yes, and give us the money to expend in accordance with its provisions.

My brother has stated that you will be permitted to travel the roads outside the Reservation. We have some kind of roads which perhaps you have never seen; we may wish to make one of the roads from the settlements east of the mountains to our settlements here; they may desire to run that road through your Reservation; if we desire to do so we wish that privilege; that kind of road we call a railroad. I will try and explain to you the way in which we make such roads. We first lay on the ground sticks of timber, we then lay other sticks across in that way, unite them together and put a strip of iron on the top of them, we then place a waggon on those tracks and instead of having horses or oxen hitched to the waggon we build a fire; some of you have seen a steamboat; they have on this waggon a boiler filled with water, the fire heats the water and produces steam, which propels the machine. I am unable to explain the machinery or the way in which it works but they travel faster than your swiftest horses can run, all the time. If we start from here at sunrise we can be at Wascopen by the middle of the day. We sometimes attach twenty of those waggons together and one of those Engines draws the whole, they will take waggon s enough to draw more people than are here. We call the waggon in which they have the fire and water a Locomotive: I have rode on those waggons many a time so have our people here all or nearly all of them. Now if our cheif desires to construct such a road through your country we want you to agree that he shall have the privilege. You would have the benefit of it as well as other people.

We have another improvement that I wish to speak to you about, it is called a Telegraph. We may possibly desire to make such an improvement through your country. We set posts into the ground 15 or 20 feet high, and as far from here as that house; when the posts are set we place a wire on the top about as big as that; this wire extends as far as we wish to make the road if it is 100 or 1000 miles.

If my brother is at Oregon City and desires to speak to the Great Cheif he speaks to him if the wires extend that far; the man at the other end of the land will know what he says as quick as I who stand beside him; if the instrument which is attached to this wire should be in your country and a man should steal your horse, and you desired to send word to the Willamette Valley, you would tell this man and he would work the machine and the man in the Willamette would understand you had lost a horse, and before the theif could reach there they would know it, arrest him before he came. You may not understand them now, but when you know as much as the white man you will.

Now as we give you the privilege of traveling over roads, we want the privilege of making and traveling roads through your country, but whatever roads we make through your country will not be for your injury.

I told you yesterday I would explain to you another Reservation, but that Reservation is for the people who live below here; there are but few of them here; and as I expect to hold a council with them when I return, and as that Reservation does not particularly interest you, I need not explain it now.

Now I want you all to talk among yourselves and think about what has been said to you, and I want you to think of it like men. When you think of it if you say that what we have said is good and that you receive it, you can express it to us and we can soon write out the Treaty.

You are now tired, you have been long sitting, you know our hearts, and if there is anything you do not fully understand before you make up your minds come and inquire and we will explain. If any of you wish to speak now we will listen to you. Or if you can make up your minds so as to give us an answer this evening come and do so and we swill be ready to receive it.

Stachas Said. My friends I wish to show you my mind, interpret right for me. How is it I have been troubled in mind? If your mothers were here in this country who gave you birth, and suckled you, and while you were sucking some person came and took away your mother and left you alone and sold your mother, how would you feel then? This is our mother this country, as if we drew our living from her.

My friends, all of this you have taken. Had I two rivers I would be content to leave the one and live on the other.

I name three places for myself, the Grande Ronde, the Touchet towards the mountains and the Tucannon.

That is all I have to say.

After a long pause—

Gov. Stevens Said. My brothers, if you do not feel inclined to speak today, we will come together again tomorrow.

We want the cheifs and the people to speak freely as Stachus has done. We will think of what Stachus has said. We could give our reasons now but we are all tired. We will tomorrow after you have spoken, state what we think. Come early in the morning and let us see if we cannot agree before night.

The Council is adjourned till 9 o'clock tomorrow.

Five Crows Said. I am as it were without thinking yet. I require time to think and then I will answer.

Council then adjourned at 4 1/2 P.M.

Thursday, June 7th.

Council met pursuant to adjournment - at 12 o'clock - Present as before.

Gov. Stevens. Said. My brothers we expect to have your hearts today, let us have your heart straight out.

Lawyer Said. My friends you have been speaking to me a poor people. This Earth is known as far as it extends. This earth has red people on it and it has had as far as it extends. The people are lost, they don't think whose talk has come to us poor people. On the other side of the big water there is a large country. We also know that towards the east there are a great many different kinds of people: there are red people and yellow people and black people, and a long time ago the people that travelled this country passed on the waters. And there is that country on that other side of the big water and

here is this on this side. On the other side of the big waters they have their laws. Yes, they have their laws there. We now hear the laws they have there, and we now know they have those laws there. We also know the white people pass about on the waters as they wish to. I do not know what they find in travelling about on these waters or what they are hunting, whether it is timber, leaves, grass or what. It was the Spaniards in that direction that just travelled about in their ships, they were the ones who first discovered this country and it was in that way they travelled to look for things, in that way they travelled when they found this country; the red people that along the shores to the big waters, those were the people, and at this place they landed to see those poor people. At that place the red man started and run off, or a part of them did because they did not know the people who came to see them, and the rest came and met them, there is where the white people first placed their children when they first come into the land. From this country they took back samples of rich earth, of flowers, and all such things; they also reported that there was a country on the other side, and it was peopled and these people reported they had found a country. And it was known that there was a new country found. And one of the head men said. I knew there was a country there before. Columbus the discoverer said Can you make an egg stand on end. Although he tried he could not do it, he did not understand how, it fell over: then Columbus showed them all that he could make it stand, and he did it, he made the egg stand. After they saw it done they could all do it.

Those children that he had placed in this country among the red people, from them the blood ran on both

sides: that is when the laws come into this country to those poor people: there were a great many white people come back to that place; that is the reason the red people travelled off further and from that they kept still travelling on further as the white people came up to them and this man's (Delaware Jim) people are from the same people: they have come till they are here to us now, and from that country some central part came Lewis & Clark, and that is the way the white people travelled and came in here to my forefathers. Where they came into our country they named that stream Kooskooski: it was then they knew us poor people. They passed through our country and knew all our country and all our streams, and on their return my forefathers used them well: as well as they could.

From the time of Columbus and from the time of Lewis & Clark we have known our friends: we poor people have known you as brothers although we were a poor people, a people knowing nothing when we first saw the white cheifs Lewis & Clark. From those poor people there were some of them that started in that direction (east) and of these there is only one now living (Spokane Gerry) they want to be taught, they returned after they could see a little and told us about the Great Spirit: they told us the laws for the poor people; they had seen and heard them. My Chief said our old laws are poor, the new laws we are getting are good laws, are straight. We said there were these laws, the laws of the Commandments; our old laws the laws of our forefathers and the new laws we are getting shown to us there were laws and those laws should be sent to us.

Ellis our Chief spoke strait for the white people, the President has sent you here to us poor people. Yes! the

President has studied this and sent you here for our good. That is the reason I said on Monday use us well my Chief we are a poor people.

The Governor has said the President has sent him to take care of his children: it was you that had spoken thus my brothers (Gov. Stevens and Gen. Palmer) I want the President to see what I a poor man has said. I have got your talk here (pointing to his note book) and although a poor man I can look at it from time to time. I can take care of that; my brother, we have been talking a long time and are all tired.

I think on the stream just below where Mr. Craig lives will be a good place for one mechanic or/on one of the ranches you have shown me. I also think/that perhaps in the country where I live may be good place for some more of them, in case they were crowded below it would be a good place where I live.

Now my friends I have spoken; those things that have been talked of, you know, I have shown you my heart. You have said to them all you had to say. I have also given you all I had to say.

Then my friends I have spoken; those things that have been talked of you know. I have shown you my heart. You have said to them you have said all you have to say. I also have said also all I have to say.

You spoke of a road through my country (the Reserve) it is a bad country, to make roads in, but perhaps it may go through, that is the reason I think we have both talked. 'Tis all our talk. Our Father Chief has said take care of one another. There is no reason that I should speak long although I have more to say. That is the reason I say take care of us well: that is all I have

to say at this time, my brethren. I will have one word more to say when we are about to part.

Gov. Stevens. We have the heart of the Nez Perces through their Chief, their hearts and our hearts are one. We want the hearts of the other people through their Chiefs.

Young Chief. Us Indians are blind the reason we do not see the earth well, the Lawyer sees clear. The reason that I do not know anything about this ground is I do not see the offer you have made us yet. If I had the money in my hand then I would see: the country is very large is the reason this land is afraid. I wonder if this ground has anything to say: I wonder if the ground is listening to what is said. I wonder if the ground would come to life and what is on it: though I hear what this earth says, the earth says, God has placed me here. The earth says, that God tells me to take care of the Indians on this earth; the Earth says to the Indians that stop on the Earth feed them right. God named the roots that he should feed the Indians on: the water speaks the same way: God says feed the Indians upon the earth: the grass says the same thing: feed the horses and cattle. The Earth and water and grass say God has given our names and we are told those names: neither the Indians or the Whites have a right to change those names: the Earth says, God has placed me here to produce all that, grows upon me, the trees, fruit, etc. The same way the Earth says, it was from her man was made. God on placing them on the Earth during then to take good care of the earth and do each other no harm. God said. You Indians who take care of a certain portion of the country should not trade it off unless you get a fair price.

I am as it were, blind. I am blind and ignorant. I have a heart but cannot say much, that is the reason the Chiefs do not understand each other right. They stand apart. Although I see your offer before me I do not understand it: Lawyer understood your offer and he took it I do not understand it and I do not yet take it: I walk as it were in the dark and cannot therefore take hold of what I do not see. Lawyer sees and he takes hold. When I come to understand your proposition then I shall take hold. I do not know when. Tis all I have to say.

Five Crows said. I will speak a few words. My heart is just the same as the Young Chief.

Gen. Palmer. We know no chief among the Walla Wallas but Pe-pe-mux-mux; if he has anything to say we should be glad to hear it.

Pe-pe-mux-mux. I thought these Indians were all the same as one, all alike (addressing the Indians he said). Why do you speak to one another? Listen to me. That is the way with your Chiefs, you white people. When you show us something then we think it good, treating us as children, giving us food. I do not know what is strait. I do not see the offer you have made to the Indians. I never saw these things with my father. My heart cried very hard when you first spoke to me, the same as if I was a feather. I flew, then I thought the same as if you were talking to a feather. I thought what will I do? I have seen everything on both sides of the river. You are all talking together, we are all talking together. If you were to separate as we are now and appoint some other time we shall have no bad minds. Stop the whites from coming up here till after this talk,

not to bring their axes with them, the same as if I saw my heart above.

I hope the president will not think I say or mean anything bad, there is no difficulty in sending letters about; this that I have said to you I do not know in what light you have taken it, whether I have spoken straight or wrong. The whites may travel in all directions through my country we shall have nothing to say to them providing they do not build houses on our land. Now I will speak about Lawyer.

I think my friend has given his lands, that is what I think from his words. You hear both of you what I say - it is only that I request another meeting, whenever it shall be. It is not only by one meeting that we can come to a decision. I have listened to you in a friendly way. If you come again with a friendly message from the President I shall see them at this place, tomorrow I shall come to see you and towards evening I shall go home. You have spoken to us in a friendly way and I speak to you in the same way, slowly. Gov. Stevens and Gen. Palmer I cannot give you a direct answer, perhaps you will not think well of my words. I beg you will leave me in this way for today. Tomorrow I will give you answer. I do not know; that is all I have to say.

Gen. Palmer. I wish to say a few words to these people, but before I do so if Kam-i-ah-kan wishes to speak he can do so.

Kam-i-ah-kan Said. I have nothing to say.

Gen. Palmer. I would inquire whether Pe-pe-mox-mox or the Young Chief speaks for the Umatillas. I wish to know if they are of the same heart.

Owhi. I have nothing to say about this land today. God gave us day and night, the night to rest in and the day to see, and that as long as the earth shall last, he gave us the morning with our breath; and so he takes care of us on this earth: and here we have met under his care. Is the earth before the day or the day before the earth. God was before the earth, the heavens were clear and good and all things in the heavens were good. God looked one way then the other and named our lands for us to take care of. God made the other. We did not make the other, we did not make it, he made it to last forever. It is the earth that is our parent or it is God is our elder brother. This leads the Indian to ask where does this talk come from that you have been giving us. God made this earth and it listens to him to know what he would decide. The Almighty made us and gave us breath: we are talking together and God hears all that we say today. God looks down upon his children today as if we were all in one body. He is going to make one body of us: we Indians present have listened to your talk as if it came from God.

God named this land to us that is the reason I am afraid to say anything about this land. I am afraid of the laws of the Almighty, this is the reason I am afraid to speak of the land. I am afraid of the Almighty that is the reason of my hearts being sad: this is the reason I cannot give you an answer. I am afraid of the Almighty. Shall I steal this land and sell it? or what shall I do? this is the reason that my heart is sad.

I love my life is the reason why I do not give my lands away. I am afraid I would be sent to hell. I love my friends. I love my life, this is the reason why I do not give away my lands. I have one word more to say.

My people are far away they do not know your words, this is the reason why I cannot give you an answer now. I show you my heart, that is all I have to say.

Gov. Stevens. Now will Kam a ah kan and Skloom speak.

Kam-a-ah-kan What have I to be talking about?

Gen. Palmer. We have listened and heard your Cheifs speak. The heart of the Nez Perces and ours are one. The Cayuses, the Walla Wallas and these other people say they do not understand us. We were in hopes we would have but one heart. Why should we have more than one heart? The Young Chief says he does not see what we propose to give them. Pe-pe-mox-mox says the same. Can we bring these saw mills and these grist mills here on our backs to show these people? Can we bring these blacksmith shops, the wagons & tools on our backs to show them at this time? Can we cause farms of wheat and of corn to spring up in a day that they may see it. Can we build these school houses and these dwellings in a day? Can we bring all the money that these things will cost that you may see it. It would be more than all the horses of any one of these men could carry. It takes time to do these things. We come first to see you and make a bargain. We brought but a few goods with us to give you but whatever we agree to give you you will get.

How long will these people remain blind. We came to try to open their eyes they refuse the light. I have a wife and children, my brother has also a wife and children. I have a good home, fields of wheat, potatoes, oats, peas and beans. Why should I leave them and come so far to see you? It was to try and do you good

but you throw it away. Why is it that you do so? We all sometimes do wrong. Sometimes because our hearts are bad, and sometimes because we have bad council. Your people have sometimes done wrong. Our hearts have cried. Our hearts still cry, but if you will try and do right we will forget it. How long will you listen to this bad council and refuse to receive the light?

I too love the earth where I was born. I left it because it was for my good. I have come a long way. We ask you to go but a very short distance. We don't come to steal your lands, we pay you more than it is worth. Here in this little valley and the Umatilla valley that affords a little good land, between these two streams and all around it is a partched up plain. What is it worth to you or to us? Not one half of what we have offered for it. Why do we offer you so much? It is because our Chief has told us to take care of his red people. We come to you with his messages to try and do you good. You throw his words behind you. Why do you do it? because you have listened to bad council.

I told you the difficulties that existed between the whites and the Indians beyond the mountains. If the whites and the Indians live together here as they did there, it would be the same. Our Chief knows this and he sent us here to see you and to talk with you, this we do before there are many whites here.

Pe-pe-mox-mox says "let us part and appoint another day". Before that day would arrive we might have a great deal of trouble. Gold has been found in the country above yours. Our people are very fond of it. When our people hear this they will come here by hundreds, among these who come there will be some bad people, those bad people will steal your horses and

cattle. There are but few of you, you cannot prevent it when you are scattered over a great extent of country, you cannot prevent it: but if you are living in these reservations we can protect you and your property. Then why should you refuse to receive our talk and refuse to allow us to protect you? Your refusal to receive it is not such talk as should come from Chiefs desirous of promoting the interest of their people. I want you to think more of this tonight and if you act like wise men I think you will arrive at a different conclusion.

We expect to perfect the arrangements with the Nez Perces perhaps tomorrow. We have but one heart, we expect it will always remain so. We want the Walla Wallas, the Cayuses and the Umatillas to unite with us and have but one heart: we want you to stop your ears against bad council and receive that which is good. We do not come among you as traders we come bearing the words of our Great Chief. If you refuse to receive it our hearts will be sad. Our hearts will be sorry for these chiefs for we like them. Our hearts will be sorry and bleed for all these old men. Our hearts will be sorry and bleed for these young men. Our hearts will be sorry and bleed for these women and children.

We want to help you to put food into your lodges and homes. We want to help you to get clothes and blankets to cover you from the storm; we want to help you to get arms and ammunition to kill game; we want to open your eyes and give you light that you may see. We want to make you a good people.

Will you receive our talk or will you throw it behind you. My heart will be glad tomorrow if you come and say we are all of one heart.

What I have said is for your good: think of it. I have nothing more to say.

Cam an pello It is true you have mercy on us. I think it is true what you have been saying: if you were to send me into a mountanous country still I would say you have mercy on us. What would I be glad for? I was glad to hear the first talk by the Governor, that was the reason I was glad to hear what they said. I would be very glad if he had said to me stop over on one side, then I would be glad.

What would I be glad about if I were to take a thing and throw it away? That is the reason my heart cries. If you would show me fine lands and I were to see them then I would be glad and go to them. How do you show your pity by sending me and my children to a land where there is nothing to eat but wood? That is the kind of land up there, that is the reason I cry. Look at my hands! An old man. I have but them by hard work: then I ask myself have I labored in vain? what have I to be glad for?

The white man first showed me and aided me in making my garden and every mile I have been laboring. Will God think nothing of the labor I have bestowed on my garden? Do you do this to me in pity? I am really pitiable and therefore I pray night and day till I am tired. I have no books. The missionaries told me if I had no books I had a book in my heart which enabled me to pray to God. They told me in taking water to drink I should think of God, this I have not learned of myself, it is what they have taught me and I keep it. The laws of God are not alone for you, they are for me as well.

Woa-lish-wam-pum I have got only two thing to say. I have listened to your speech without any impression. I did not understand it. I know this. We are the same. You have life and breath you white people; we red people have life and breath. I think the old laws are straight, that they should still exist.

The Nez Perces have already given you their land. You want us to go there. What can we think of that? That is the reason I cannot think of leaving this land to go there. Your words since you came here have been crooked. That is all I have to say.

Gen. Palmer. I desire to say a few words in reply to Cam an pello, he says he "is an old man, he has worked hard in his garden." We have said that any man who has a garden or a field and who left it to go to this reservation should have as much improvement made there for him, or be paid for it in money as he chooses. We will go farther and say he shall have a better improvement: it shall have a better fence, be ploughed well. We will not take them there to starve, they shall live better than where they are and if there is not good land enough in the reservation to make them farms we will make it larger.

Gov. Stevens Said. Although you are all tired, my friends, I must say a few words. My Brother and myself have talked straight. Have all of you talked straight? Lawyer has and his people have. And their business will be done tomorrow.

The Young Chief says he "is blind and does not understand, What is it that he wants?

Stickuss says his "heart is in one of the three places, the Grand Ronde, the Touchet and the Tu-kan-on".

Where is the heart of the Young Chief?

Pe-pe-mox-mox "Cannot be wafted off like a feather." Does he prefer the Yakama reservation to that of the Nez Perces"? We have asked him before, we ask him now—where is his heart?

And Kam-a-ah-kan the great Chief of the Yakimas has not spoken at all. His people have had no voice here today. He is not ashamed to speak—he is not afraid to speak—then speak out.

But Owhi is "afraid lest God be angry at his selling his land". Owhi, my brother I do not think God will be angry if you do your best for yourself and your children. Ask yourself this question to night. Will not God be angry with me if I neglect this opportunity to do them good? Owhi says his people are not here. Why did he promise to come here to hear our talk. I do not want to be ashamed of Owhi. Owhi has the heart of his brother Teayass and his people; we expect him to speak straight out.

We expect to hear from Kam-a-ah-kan from Skloom. The papers we will have drawn up tonight. You can see them tomorrow. The Nez Perces must not be put off any longer, their business must be dispatched.

I hope the hearts of all the others and our hearts will agree. They have asked us to speak straight, we have spoken straight. We have asked you to speak straight, but we have yet to hear from you.

Gen. Palmer This man (How-lish-wam-pum) says the reason he does not want to go to the Nez Perces' country is that they have given it to us. If he and his people go on that Reservation it will belong to them as

much as to the Nez Perces. They will all be served alike, every man will have his farm, it will be his.

Pe-pe-mox mox says we have met as friends let us say nothing that is bad, let us part friends. We have been friends a long time". I hope we shall always remain friends and as brothers. When we part we will part as friends. Then let us act as friends and as wise men.

Five Crows Listen to me you Chiefs. We have been as one people with the Nez Perces heretofore; this day we are divided. We the Cayuses, Walla Wallas, and Kam-a-ah-kans people and others will think over the matter tonight and give you an answer tomorrow.

Owhi Kam-a-ah-kan is the man who is to speak about these lands. I have nothing to say about them. We will settle the matter among ourselfs.

Gen. Palmer We have heard what Five Crows has said. We want all this people to have one heart, they ought not to have two hearts. Our Great Chief looks upon them all as his children and I hope you will think on what is here said to you.

Gov. Stevens My Friends, we will meet in the morning again, we have to get through the business of the Nez Perces so that they may get home, they have a long journey before them. We shall meet as friends I hope. Your hearts and ours will be united I trust. We want every person to come early. If any person wishes to speak, speak now or otherwise we shall meet in the morning.

Council met at

Gov. Stevens Said. My friends, judging from your faces, I think you see your way clear. The paper of the Nez Perces is nearly ready and soon will be read to them. We expect that the Young Chief, that Pee-Pee-mox-mox and Kamiakan will speak now, and we hope that with them the business may be concluded today. Let us know what they want, we are here for that purpose.

The Young Chief Said, We have been tiring one another for a long time. We did not know our hearts, we did not understand each other on both sides, about this country. We have so many horses and cattle in this country is the reason we were troubled. Your marking out this country is the reason it troubles me so and has made me sit here without saying anything. You Americans, your forefathers are dying in your own country, as many of your people are wealthy in stock it requires a large tract to keep them. Those that have large bands of cattle marks each one a tract for himself. The reason why we could not understand you was that you selected this country for us to live in without our having any voice in the matter. We will think slowly over the different streams that run through the country, we will expose the country and think over it slowly. I cannot take the whole country and throw it to you. If we can agree this country will furnish food for the whites and for us. The whites and ourselves will be compelled to have equal privileges in getting timber from the mountains to build our houses and fences; then we shall love one another. The good of you white people is foremost, the bad is behind, it is the same with us. You embraced all my country, where was I to go, was I to be a wanderer like a wolf. Without a home,

without a house I would be compelled to steal, consequently I would die. I will show you lands that I will give you, we will then take good care of each other. The reason for my uneasiness is for my stock which is running all over the country. Perhaps we will be compelled to divide with our stock, one taking one way the other another way, perhaps out there (pointing South) it would be well to draw a line to divide us. This is the reason why I think we should stop a while that we may come to an agreement. We will see when you make another offer whether we can agree to it. Wait, we may come to an agreement when we see your offer, if any people come send good people; those of the settlers who are here now it is well they should stay. I think the land where my forefathers are buried should be mine; that is the place that I am speaking for. We will talk about it, we shall then know, my brothers, that is what I have to show to you, that is what I love the place we get our roots to live upon (meaning the Grand Ronde). The Salmon comes up the stream–that is all.

Gen. Palmer Said: My brothers, when we quit talking yesterday your minds were very much troubled, you were unwilling to go to the Nez Perces reservation. We have thought of your words. The Nez Perces have a great many horses & cattle, you too have a great many horses & cattle, perhaps you might not agree together quite so well; your people appear to be much divided where to go. We asked you to give us your hearts and tell us where it was, the Young Chief (We***) has given us his heart, the Grand Ronde Valley. We have thought of the Umatillas. Many of your people died there. It is a good country for your horses and cattle. We desired first to have you go all to one place, but to show you

that we wish to do you good I will make you another proposition. I propose to designate for the Cayuses, the Walla Wallas & the Umatillas--To commence on the Columbia river (this is the Columbia river (pointing to the map) this is the Umatilla river, this is the Agency, this is McKay's place, this is Wild Horse Creek. Now I propose to select a reservation commencing at the mouth of Wild Horse Creek and running up this creek to the mountains to the head waters of Hou-te-nic Creek, now down that creek till you strike Mr. McKay's claim, now across from his claim to the Umatilla river, then up to the mouth of the Wild Horse Creek, leaving Wm. McKay's claim out of the reservation. This will include all your farms, your houses and gardens within the reservation. You will have sufficient grazing for your stock and land to make farms but your stock will have the privilege of grazing on any lands not claimed by the whites. If the whites should settle near to the reservation their stock might sometimes go onto the reservation while yours might go off it; if they should do so we would not want you to quarrel about it. We would build at suitable points on the reservation a saw-mill and a flouring mill; we would employ millers to attend them for you for twenty years, and by that time you would be able to attend them yourselves. We will have a blacksmith shop and employ a blacksmith for 20 years; we will have a plow and wagon-makers shop and employ mechanics for that for twenty years; we will have a carpenter and cabinet makers shop and employ mechanics for that for 20 years – we will have at least two school houses and employ teachers for at least 20 years; we will build a hospital and furnish a doctor and medicines for twenty years; we will build a good house for Pee-Pee-Mox-Mox, and a good house for the Chief of the Cayuse; we will build a house for

Pee-Pee-Mox-Mox's son, we will plow and fence ten acres of land for Pee-Pee-Mox-Mox; we will plow and fence the same for the chief of the Cayuses; we will plow and fence five acres for Pee-Pee-Mox-Mox's son; we propose to do more for him and for his son because he leaves his country and goes to another place. We will give him as soon as he goes down to the Dalles for it $500, in money - we will give him 3 yoke of oxen, wagon and two plows - we also give him some other things which it is not necessary to mention. We give him a salary and also the chief of the Cayuses of $500. a year, in money, this to continue for 20 years - the same as is to be given to the Lawyer, the head chief of the Nez Perces. We give these salaries because they are the head chiefs, and are expected to labor for the good of their people, and in the event of the death of the head chief their successors get the salaries. Now in addition to these things we will expend fifty thousand dollars in the first and second years after the treaty is ratified. This money is to be expended in building houses, opening farms, buying teams and wagons and paying persons working for them, and in any way that the President may deem best calculated to promote their interests. In addition to this there will be expended for you eight thousand/dollars every year for five years, for the next five years six thousand dollars a year, the next five years four thousand dollars a year, for the next five years two thousand dollars a year -- this makes twenty years, and the amount to be expended one hundred thousand dollars ($100,000). This amount will be expended as the President may direct; we should consult you every year as to how you wanted it paid -- part in money -- part in goods. You will not be required to go onto this reservation till our chief the President and his council sees this paper and

says it is good; and we build the houses, the mills, and the blacksmith shop. But we want you to allow the white people to come and settle in the country anywhere outside of the reservation. The President will have this reservation surveyed and marked off, so that every man that has a piece of land will know which is his. You will be allowed to go and catch fish and dig roots the same as the whites; and if any of our people do wrong to you you are not to shoot them, but to go to the Agent. We expect the chiefs to restrain their young men from doing wrong. We have a few goods here for you, those that we give you will be in addition to these payments, we charge you nothing for them. I have given you now my heart; I have offered you more than your country is worth – more than you know how to count. How long will it take you to decide? I f you say it is good the papers can be arranged tonight, tomorrow they can be signed; we would then give you these goods and you could go home with a good heart. We have been here a good many days talking - we are all tired; we commenced far apart; it is for you to say now whether we shall come together. This I say to the Cayuses, the Walla Wallas & Umatillas - those people are all interested; Pee-Pee-Mox-Mox being the first chief I want to hear from him. I have nothing more to say.

Pee-Pee-Mox-Mox said – The young chief has nothing more to say; he has said all he had to say, as if it was I that put obstacles in the way. Our hearts should not be otherwise than one. I have already spoken all that I have to say – I and Gen. Palmer this morning. They have already written all that we have said. I spoke this morning about having a little house, a place to sell my cattle on the other side of the Columbia where my

cattle range for a trading post when the Americans pass. I have nothing to talk about; I have only a few words more. I said to Gen. Palmer that I desired permission to get fish there while I lived; when I learn that the house is made, (meaning the reservation) then I shall go there: when we have settled all things then you have your presents for these Indians. Now that we have made up our minds if you think proper you may give us some provisions; sometime tomorrow in the afternoon we will go home; you are now tired - that is all I have to say.

Gen. Palmer Said: - That we have agreed that Pee-Pee-Mox-Mox shall have the privilege of building a house at the mouth of the Yakima and catching fish for five years. I should like to have all the chiefs and head men of the Umatillas, Cayuses and Walla Wallas and also the name of every man on this paper that the President may see every man's name and know that they have given their consent.

Gov. Stevens Said: – My friends. I am glad Looking Glass one of your chiefs is coming, he is a friend of Kamiakun; we have now got nearly round the circle; our hearts are almost together; I call upon Kamiakun to say whether we shall get entirely around. My friends, Looking Glass is close by: –he has come way from the Blackfeet - the buffalo country across the mountains; there is war; here is peace and friendship let his first glance be upon you sitting here; when he is close by two or three of us will go and take him by the hand and set him down by his chief in the presence of his friend Kamiakun. Let us now have Kamiken's heart.

Kam-i-ah-kan Said: The place that I am from there are but few Indians—all have gone to the Calapooya country. Some are at Nisqually and some at Taih—that is the reason I have deferred speaking till I see my Indians. I wish the Americans to settle on the wagon route; we do not confine them to the road; they may settle about the road so that the Indians may go and see them. I do not speak this of myself it is my people's wish. Owhi and Teias and the chiefs. I, Kamiakan do not wish for goods myself. The forest knows me, he knows my heart he knows I do not desire a great many goods. All that I wish is for an Agent, a good Agent who will pity the good and bad of us and take care of us. I have nothing to talk long about. I am tired, I am anxious to get back to my garden. That is all I have to say.

Joseph, Nez Perce: These are my children (looking around). I see them all sitting there: talking slowly is good. It is good for old men to talk straight; talk straight on both sides and take care of one another. It is not us, it is those of our children who come after us. It is good for the old people to talk together good and straight on account of our children on both sides to take care of each other till the last day, without speaking I am going. It is not anything bad that I am thinking that I am going without speaking, no, it is not anything bad, it is a place to live, a place for our good to live there. Think for year after year for a far way ahead. I wonder what you think if I could see your thoughts. It is not that there is anything bad that I speak. I hear you speaking to my children, and they have many hearts. I am going without talking and you don't know my talk. At the Grand Ronde I saw my children on both

sides; we have been talking and finished your talk; this is all I have to say.

Gov. Stevens Said. If anybody else wished to speak we shall be glad to hear them.

Red Wolf Said: I have only one or two things to speak: - I want Mr. Craig to stay there in the Nez Perce country, and not go away. The reason why I wish Mr. Craig to stay there is because he understands us - he speaks our language well; when there is any news that comes into the country we can go to him and hear it straight; the same for us when anybody comes to speak to us he will sit down with us and we understand them. It is good for him to stay there to interpret on both sides so that each can understand the other.

Gov. Stevens said: We wish to hear from Scloom, one of the Chiefs of the Yakimas.

Scloom said: What I have to say is about this the earth; It is long since the earth was made and the trees were made to grow out, and there was one there, a very small boy, I do not know what he knew but he took an axe and cut a tree, and marked it as if he has made a watch, he went to the tree and looked up and saw a star, he took a line and measured the land from that tree; all the land he had measured he plowed; about half way on the line he threw the tree across. For this country that he had plowed up he got $800 for each mile: That is the reason the Indians like the place where they have their gardens; for the reason there was such a price paid for them; the land uncultivated where there are no gardens is not worth so much, it might be sold for $40 a mile. Why should I speak a great deal? We are not bargaining for lots; you know

your own country above, you select your piece of land and pay a price for it. There it is the same and have choice. My friends, I have understood what you have said; when you give me what is just for my land you shall have it. This is all I have to say.

Gov. Stevens Said: I have a word to say in answer to the remarks of Skloom. Proposals have been made for the lands of the Yakimas and their neighbors; a place has been pointed out for the Indians to live in; outside of this place the gardens and farms are to be paid for in money at a fair value. The price paid will probably be a good deal more than the price he has mentioned for those gardens. I say to Skloom, we do sell good lands for eight hundred dollars a mile, but not in this country. We do not expect to sell any of this land. Skloom probably knows that. I ask Kamiakan and I ask Skloom, make your own propositions. I also say to Owhi, let us know what you think your lands are worth and where you want your home. We shall meet again in the morning, I want Kamiakun and his chiefs to make their own proposition. Looking-Glass is coming. We shall meet tomorrow morning.

Saturday, June 9th

The Council was opened at 2 o'clock P.M. when Gov. Stevens Said

My Friends, Today we are all I trust of one mind. Today we shall finish the business which brought us together. Yesterday the Yakamas had not made up their minds fully. Today they and ourselfs agree; the papers have been drawn up. A paper for the Nez Perces: they live on one Reservation. A paper for the

Walla Wallas, Cayuses and Umatillas, they have their Reservation on the Umatilla. And a paper for the Yakamas, they have their Reservation. These papers engage us to do exactly what we have promised to do.

My brother explained yesterday to the Walla Wallas, Cayuses and Umatillas what would be given in their paper. It has been given to them in the paper.

In the paper for the Yakamas we have included the tribes who acknowledge Kam-i-ah-kan for their head chief. The Pisconse, the Swan-wap-um and Palouse, the Yakamas, and all the Bands on the Columbia below the Walla Walla down to the White Salmon River. They have their reservation and fishing stations which they well know and which I understand is satisfactory.

The Nez Perces have their reservation as was shown them in council and in the paper everything was set down which was promised them. They all know what was said.

The money, the payment intended for the Nez Perces, the Walla Wallas, the Cayuses and Umatillas has been divided. We have given two parts or a $150,000 to the Walla Walla, Cayuses and Umatillas, We have given the Nez Perces three parts or $200,000.

In the Yakama reservation we have not placed as many tribes as we expected. We have thrown out the Okan-ah-gaus and Colvilles and the Tribes below the White Salmon. Their numbers are about the same as the Nez Perces. We have given them the same amount. There is the paper for the Nez Perces (holding it up), here is the paper for the Yakamas. My brother will show the paper for the Walla Wallas, the Cayuses, the Umatillas.

It is stated first in all the papers the Indians who signed the paper. then your lands are described. We have got the descriptions from yourselfs. Then your reservations are pointed out, those you all know.

You will not be called according to the paper to move on the Reservation for two or three years: then is secured to you your right to fish, to get roots and berries, and to kill game; then your payments are secured to you as agreed; then your schools, your shops, and physician and the other things we have promised you are secured; then the salaries, the houses and the ten acre farms of your chiefs are secured to him.

Then there is another article if any of you get into debt then payments cannot be taken for your debts, every Indian must pay his own debts.

Then you promise/next to be friendly with other tribes and the whites.

Last you are to drink no whiskey and do all you can to prevent others doing it: and also those who drink whiskey will not be paid their annuities.

I have thus given the substance of the different Treaties. Shall it be read over in detail? You have already heard it not once but two or three times. It can be read over Article by Article and the Interpreters can state to you whether it is what you are promised. If there is anyone present who wishes to speak let him do so before we go on with this business. Let Looking Glass speak.

Looking Glass said. I am now going to speak. From those who have been speaking, they have been listening to us from above and from the ground. A long

time ago the Great Spirit spoke to my children. I am from the body of my parents and I set on a good place. The Great Spirit spoke to his children the Laws, will track on the ground strait and after that there have been tracks on my ground and after that the big Chief, the President, his ground was stept on in the same way and for that reason I am not going there to trouble on his grounds and I do not expect anyone to tramp on mine.

I have great respect for my friends, he sees your eyes and your hearts, and that is the reason all this people are his children. Why do you want to separate my children and scatter them all over the country? I do not go into your country and scatter your children in every direction.

It is for me to speak for these my people my children, that is what I say. The Big Chief speaks to his children and I also speak to my children and tell them what to do: and that is what we are talking about: you see where the sun is. I never go where the whites are and mix with them and talk with them.

I am already named from above, by the Supreme Being, my heart is with the country. I live upon and head, that is the reason my heart tells me to say where my children shall go. I want you to look well to what I have shown you.

I want to know if an Agent will stay up in my country?

Gov. Stevens As long as there are people.

Looking Glass Will the Agent be there that long to keep the whites from pushing into our country?

Gen. Palmer said. Certainly.

Looking Glass. It is not for nothing I am speaking to my chiefs, it is to talk strait, it is just as if I were to see the President and talk to him it would be straight, that is just what I want, that you talk straight from the President. Look at my talk. I am going to talk straight. When I hear your talk it goes to my heart. I am not like those people (pointing about) who hang their heads and say nothing. We will have a short talk, not a long one. (after a silence of a few minutes the)

Young Chief Said. That is the reason I told the Governor to let it be till another time, till we know what the Looking Glass would say. I heard that Looking Glass was coming.

Governor Stevens I will say to the Young Chief, let Looking Glass have time to think, he is thinking now in order that he may speak, he will speak straight and from his heart. We will wait now till we have heard Looking Glass speak.

Looking Glass. The line of the Cayuse Reservation will be where the trail crosses the Walla Walla, thence in a straight line to the Umatilla below Wm. McKay's house, from thence north of the butte, straight to John Day's River. The reason why that shall be the line is that they want more room for their horses and cattle. (After a pause of a few moments he continued) By what time will you build the mill?

Gov. Stevens The year they move on, when the President approved the Treaty.

Looking Glass Yes! Now we will talk. We have talked before. You said you would send this talk to the

President and if he says yes, then it is right. Yes. And I will listen to what the President says and if he says yes, then we will talk.

Billy. I thought we had appointed Lawyer our head Chief and he was to do our talking, that is the reason why I have spoken.

Gov. Stevens. I will say to my brother the Looking Glass that everything we say and do is sent to the President. What Looking Glass has said and what I say now goes to the President, but can I send anything to the President unless you agree to it? Can the President act? We have met that we may agree upon something then it goes to the President. The Prest. has sent me and my brother to make this very agreement. We must agree upon something then it goes to the President and if he thinks it is good then he approves of it. I ask L. Glass to look upon it and see that it cannot be done any other way.

Gen. Palmer. Our great Chief, the President, directed me and my brother to come here. We have been here 19 days, we have been talking a great deal. That talk has been for your good. We came here to talk straight, we have shown you our hearts, we will not lie to you. Yesterday we made a bargain with the Cayuse the Walla Wallas and the Umatillas and the day before with the Nez Perces. The Looking Glass was not here but we did not forget him. We know that when he understands it all he will say yes. This morning we made a bargain with the Yakamas, they with these others all say yes. We have told these people and it is so said in the paper that their horses and cattle would be allowed to graze outside of the reservation the same as our people when it was not occupied by whites. If we

change the line to where he says we would have to stay here two or three days more to arrange the paper. We are all tired. You are tired. Shall we say one thing today and another thing tomorrow?

They have said yes! My heart says yes to the line that was shown yesterday and today. All things will be done as we told you. Shall we do so. My heart says yes. I have nothing more to say.

Looking Glass. Yes! Let it be so.

Eagle from the Light. When I spoke to you before I said that I should speak slowly and I have been thinking about what to say, but I don't know yet what to say. These people have been talking among themselfs as though there was two and when I heard what they had to say I said very well: let us go as two.

Looking Glass. What I showed these people when I came here. I spoke beyond it (referring to the map) and you have said that this talk you would send to the President and he will see it.

You see my body it is not divided, it is one body as these are all my children (pointing about). They have all got horses and cattle that is the reason I made it larger.

I want you to talk plain just like the light and then I will say yes. That is all I have to say now.

Gov. Stevens. I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the

fishing stations, that he can kill game and can go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. He knows what the Reservation is: that we promise him two mills, a saw and a grist mill, two schools and a blacksmith; that we give him a physician, and all the other things that have been spoken of: the people all know it, it has been read over two or three times.

This Reservation is in his own country. I ask Looking Glass is not this talking straight? We send all this to the President and besides this we pay a certain sum of which you all know: we have been looking for him ever since we have been here: Lawyer will recollect that I have been enquiring when will Looking Glass come? We wanted him to come.

Those who go to the Buffalo are all my children. I am going to see the Blackfeet next moon. The Blackfeet had stolen some of his horses, but he got them back again. I heard the story last night. He killed some of their men. I know that Looking Glass wants me to go and make peace in that country. Let us first agree here.

Gen. Palmer.We buy your country and pay you for it and give the most of it back to you again.

Looking Glass. You have said to me that the whites shall not go over that line, none shall go into that country and this you said and it is said: And you will show to the President what we have said.

Gov. Stevens. I understand Looking Glass has consented with the other Chiefs. The papers are now ready to sign: here I will particularly speak to Kamahkan or the head Chief of the Yakamas. Are you ready?

Young Chief. What the Looking Glass says, I say.

Gov. Stevens. I ask you whether you are ready to sign? I stated that whatever the Looking Glass said and we said would go to the President. We agreed upon a line yesterday and the day before. The papers are drawn: we ask are you now ready to sign these papers and let them go to the President.

Looking Glass. That he said yes to his line.

Gov. Stevens. Looking Glass is satisfied with the Nez Perce line, the young Chief and Pe-pe-mox-mox yesterday agreed to the Umatilla reserve.

Looking Glass. I said yes to the line I marked myself, not to your line.

Gov. Stevens. I will say to the Looking Glass, we cannot agree.

Gen. Palmer. I would say to the Looking Glass, what use is it to purchase his country and give it all back again. We did not come here to talk like boys. We don't wish to part with a misunderstanding.

The Nez Perces, the Walla Wallas, the Cayuses and the Umatillas agree to the boundaries as we have marked. Do you wish to throw all we have said to you behind you. Shall we like boys say yes today and no tomorrow? Pe-pe-mox-mox, Young Chief and the Nez Perces say yes! None of their people say no! Why do we talk so much about it? I have done.

Young Chief. The President is your Chief and you do what he tells you. That is the reason the Looking Glass marked out the line he wanted: he is the head Chief.

Looking Glass. It was my children that spoke yesterday and now I come and hear them speak. I asked my children what was their hurry? They knew that I was coming. Why did they run and speak till I came: that is the reason I marked it bigger. I wanted to talk with you and have you talk to me. And after that. Your talk and my talk will go to the President.

Gen. Palmer I will say to my brother that I did not know that he was absent when we made our minds to come here, and set the time. My brother and myself come here and we come a long way. We have been here a long time. We were not in a hurry, these people wanted to go home, they had fields of wheat, and of potatoes, the weeds were growing up, they wanted to go home, there was no one at home to take care of the fields. We have other persons to see besides these.

My Brother has to go to the Blackfoot country and make peace. He wanted to say to them. You shall not steal these peoples horses: you shall not make war upon them: these are the reasons we talk. We talk because our Great Chief told us.

The papers have not been signed, they had not forgotten him nor had we. Shall all our efforts to protect them be destroyed? Shall our talk be thrown away? If the Looking Glass is a Chief I hope he will act as a Chief acts for the good of his people.

If we were to say yes to his line our Chief would say No!. but if we shall say the line we have marked we believe our Chief will say Yes. Which will you do, take that line or have it all thrown away? Let us act like wise men and not part without doing good for each other.

Looking Glass.I am not going to say any more today.

Gen. Palmer. If the Nez Perces are to ready they can talk among themselfs and come tomorrow.

If the Cayuses, the Walla Wallas and Umatillas are ready to do what yesterday they said they would then the paper is ready for them to sign, and tonight they can get their goods and go home when they please.

The paper is also ready for the Yakamas if they choose to sign it they can do so.

Gov. Stevens. The council will now adjourn till Monday morning and I trust by that time Looking Glass will have thought the matter over and we will be able to agree.

Monday, June 11th

Council opened at 11 o'clock.

Gov. Stevens said: My children, we have met today for the last time. Every man here present has agreed to a treaty in council. The Nez Perc'es agreed to a treaty. Not one man spoke against it. All agreed that the head Cheif would speak for you. You were all called upon to speak. I called upon Joseph to speak and he spoke: "I have a good heart," says Joseph, "what the Lawyer says let it be".

The Eagle-from-the light said, "the head cheif Lawyer had spoken so be it."

The Red Wolf said, "What the Lawyer has said be it so, he is our head cheif."

Said U-ute-sin-ma-le-kin "My cheif has spoken for me." Every man said, I say again, "Lawyer is our cheif." "I agree to the treaty." So said the Cayuses, the Walla Wallas, the Umatillas and the Yakamas. The Young Cheif and Stickuus said, "we pledged our words, we agree."

We all expect that you all will do what you promised to do. We don't believe you will break your word and make us ashamed of you. I don't believe we shall have to say to the President, "you have promised, and then broke your promise."

No! We know that you will keep you word. First the Nez Perces,--I shall call upon Lawyer the head chief, and then I shall call on the other chiefs to sign.

Will Lawyer now come forward. (he then came forward and signed the Treaty) Now I call upon Looking Glass and Joseph to sign the Treaty. (After they had affixed their names James and the other chiefs and head men put their names to it.)

Gov. Stevens: My Brothers, the Treaties have now all been signed. They will be sent to the President. All the speeches on both sides will be sent to the President. The President will see that everything has been fairly explained and agreed upon between us. He will see that you have all acted like men here. He won't find any fault even with Looking Glass.

Looking Glass came back after a long absents and asked time to look at the treaty. Time was given him to think it over. He was satisfied and we find his name next to his head chief's

I think the President will approve what we have done. We will let you know when we hear from him, which will be sometime next year.

We have some few presents to give you which will be distributed upon your leaving the ground. They are designed for those who need them most. You will dispose of them in that way.

Thenceforth you will have me for your Great Chief, Mr. Tappan for your Agent, and Mr. Craig for your Interpreter.

The Yakamas will have Mr. Bolon for their Agent. The Wallas, Cayuses and Umatillas will look to Gen'l Palmer hereafter.

There is another point which I wish to speak about from my heart. It is the Blackfoot Council. My brother, the Looking Glass, knows that we want peace on those Buffalo plains. You all know it. I think I can make peace there.

Nez Perces: Nearly one fourth of your people live there. I want some chiefs of courage and character, and one hundred of your braves to go to that council. I say to Lawyer, the head cheif, of the Nez Perce's, I would be glad to have him go, I would be glad to have Looking Glass go. Arrange this among yourselfs. I hope and trust that Mr. Craig will go with you.

The Cayuses, Walla Wallas, Umatillas, and Yakamas, I would like to have some of them also.

We shall have chiefs and braves from the Flatheads, the Cour de lains, Coo-too-mey's and I hope from the Spokanes. The Blackfeet have promised to meet you

there in Council and when we meet there will be peace among you. Think this matter over and decide for yourselfs.

Gen'l Palmer: My brothers, I wish to say a few words before we part. When we came here we didn't know the hearts of your people. We have been together a long time and have talked a great deal. We have listened to what you have said, and you have listened to what we have said _____you have sometimes been afraid that we were not working for your good. Your willingness to come forward and sign the Treaty is evidence that you have decided that we intended to do you good. We have shown you our hearts and you have shown us yours. We commenced a long way apart but now we are together. We are one. I hope we shall always remain as one and have but one heart.

From this time we expect that we and you will always be at peace. We not only want you to be at peace with all whites but we want you to be at peace with yourself. We didn't come here to divide you or to induce one to be against another. Why should you be at war with each other? You may live at separate places, but your hearts would be as one and help each other. The cheifs and old men should give good council to their young people. The young men should listen to the old men and be advised by them. The young people should strive to assist the old people. Take care of them. It is the duty of the old people when they see these boys act foolish to council them. It is the duty of all to take care of your women and children, furnish them with food and with clothing.

I say again! Take care of your old people, supply their lodges with provisions, for you will soon be old yourself and will need help.

We expect you will all leave this ground with good hearts and if there are any among you that have bad hearts, advise them to throw them away. If your people are foolish and do wrong it is your duty as chiefs to punish them for it. We shall try and prevent the whites from doing wrong to the Indians, and you must prevent your people from doing wrong to the whites.

The Treaty provides that if an Indian steals the property of the whites it may be paid for from the annuities. It also provides that if your people steal other tribes it will be paid for in the same way. We also provide that if the whites take the property of an Indian it must be paid for. The Agent who is the proper person to apply to in case an injury is done you and when any of your people do wrong to the whites, then it is the duty of the cheifs to punish the offender. If one does wrong to an individual he is not to redress his own wrong but he is to submit it to the chiefs or his council, or to the Agent and abide by their decision. It is to be hoped that your people will do no wrong. Let us try and prevent it if we can. We expect the chiefs to look to this and if there is any of their people who have stolen property and have it on hand it is my heart they should give it up to the Agent, and the Agent will do all he can to return your property.

We have, my brother, told you that we had a few goods to give you. Your people are not all here to receive them. We have been here a long time and cant remain to see you all. We shall therefore give these goods into the hands of the chiefs and we expect the Head Chiefs to call his chiefs and see them distributed justly.

My Brother, Gov. Stevens, will furnish the Nez Perce's with goods. Mr. Thompson and myself will furnish the

Cayuse, Walla Walla and Umatillas with goods. And when we get through talking the head chiefs of the Cayuses, Walla Wallas, Umatilla will go receive the goods and take care of them.

We have not got a great many goods but when this paper goes to the President and he says it is good, then we will supply you with other goods, and we shall do all things that we have agreed upon. Mr. Thompson will be the Agent for the Cayuses, Walla Wallas, and the Umatillas.

When we part we will all go to our homes with good hearts towards each other. When we have built the blacksmith shops, saw mills, and chiefs home and other things we have agreed to. Then we expect you will go upon the reservation, and when you go and if you leave your little farms and improvements they will be vallued and you will be paid for them.

I shall go home with a good heart towards all your people, and I shall be very sorry if I hear your people have done wrong. I have nothing more to say at present.

If any of you have anything to say we are ready to listen to you.

Gov. Stevens: I will say to the Nez Perce's, I hope to visit them in their own country when I come back from the Blackfoot Council. I hope also to visit the Yakamas on my return.

The Cayuses, Walla Wallas and Umatillas will look to Gen. Palmer hereafter. They will also look upon me as their friend.

Tin-tin-meet-see: I understand you well. We are never the beginners in doing wrong to the whites. All Indians here understood well what has been said. When your white children come into this country they do things at random. (to the Indians) You have heard all that has been said and now let us go home and do right.

Eagle of the Light: My forefathers are all dead, I only am left, there is but the encampment remaining, it is good to hear and think of each other. We have heard good words spoken from the President to take care of us poor people well. His children's way you have come here to see. For days our bodies have been together, also the night and also for years, also for winters. You have shown that he likes his red children. I do not want our hearts to come together wrong, but right, and remain so as long as we are a people, and we will stop the bad people on both sides. The Lord will reward us both when our hearts are good that we will look and care for each other,--The old and the young will go right and then all will be right--from little could come great difficulties - that is the reason we speak from small things to big ones - that is all at present.

James Said: It is not from anything bad that I have not spoken. It is as though the man I speak of is not of the party. When the white people came to my country Mr. See told me when he came there he was coming for good and not for bad. When the white people come and they would come in great numbers do not do anything bad to them. I have never done bad to them. I wish Mr. Craig to stay with us and hear the Indians speak for he could speak to our people and they could understand him—therefore I wish him to stay.

Red Grizzly Said: I like your talk - you talk well. When you have finished I like it still, this you have brought us from the President. I like that talk my friends. From the time I spoke here I have been sick at heart. This man who has just now spoken, he spoke a little longer because he knows how to speak and there is also another who has just come, The Looking Glass, they speak straight and friendly. You have also spoken friendly, and shown them your heart plainly-not that I am a good man that I like it. My heart is glad as though I see your heart when I hear your words. What I have good to speak I have not spoke yet. (here he was interupted by the Indians when the Red Owl said the young chief wished to say that he wanted you to stop the whites from taking their horses or cattle and if my horses go across the line of the reservation which is a small one I do not want these horses and cattle to be taken off because they are over the line).

Gen. Palmer said: My brethren. This man has said from little things grow great ones. It is true, it is so—a single word spoken unkindly leads to a difficulty. It would be better if we always would not do or say bad things, but if little things are done wrong we should try and forget them. I have been told that there are sometimes difficulties among the Indians in reference to their mode of worship. That is a thing that we do not interfere with. We are willing to let the people worship God as they please. We do not say do this or do that. If their heart is to sing or pray and preach it is good, if others say it is not our heart to pray and to preach it is good, but we want all people to be good people. If those who sing and pray think it is good, let them to try to convince others. Talk kindly, treat them kindly and convince them they will do right. Some will worship

one way and some will worship another - do not quarrel about it but worship or not worship, we want you to have good hearts. I have done.–

Looking Glass Says:

As so many are now working, some other time you and I will have a heart. I have a good head and a good heart, by and by we will have a talk.

Council Adjourned sine die at three o'clock.

We hereby certify the above to be a true record of the proceedings.

SS James Doty

Secty. To Treaties in W. Terry.

SS Wm. McKay

Secty. To Treaties in O.T.

Approved

Isaac Stevens

Gov. & Supt. W.T.

Joel Palmer

Supt. Ind. Affairs

for O.T.

No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICI CURIAE* STATES OF IDAHO, CALIFORNIA, KANSAS, LOUISIANA, MASSACHUSETTS, NEW YORK, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, WISCONSIN, WYOMING, AND THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* STATES

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *In re State Tax on ForeignHeld Bonds*, 82 U.S. (15 Wall.) 300, 319 (1872). A State's authority to impose taxes "extends over all persons and property within the sphere of its territorial jurisdiction." *City of St. Louis v. The Ferry Co.*, 78 U.S. (11 Wall.) 423, 429 (1870). This Court has made clear that such "principles . . . are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States [and] [u]pon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State." *Kirtland v. Hotchkiss*, 100 U.S. 491, 498 (1879).

Applying these fundamental principles, this Court has repeatedly held that a "bright-line" standard allowing off-reservation taxation of tribal members "responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) (quoting States' *amicus* brief). The need for bright-line standards is also well-served by this Court's categorical determination that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," a principle that this

Court has stated "is as relevant to a State's tax laws as it is to state criminal laws." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973).

Here, Article III of the Treaty with the Yakama Nation of 1855 secures to tribal members the right of "free access" from their reservation to "the nearest public highway," and "the right, in common with the citizens of the United States, to travel upon all public highways." Treaty with the Yakama Nation of Indians, June 9, 1855, art. III, 12 Stat. 951, 952–53. That language says nothing about tax immunity while traveling, much less tax immunity for future trade and commerce in goods transported by Yakama tribal members over the nation's highways.

The Washington Supreme Court, interpreting the above treaty provisions, nullified this Court's requirement that exceptions to state taxation be "express" by broadly construing the Yakamas' purported understanding of the treaty so that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1020 (Wash. 2017). The court's unwarranted expansion of the treaty's plain terms upsets the "harmonious balance" between state and federal laws that is "fundamental and vital" to our constitutional system. *Kirtland*, 100 U.S. at 498.

While the relevant right to "travel" language appears in only three treaties,[1] companies owned by Yakama tribal members are claiming that the travel right exempts them from all manner of state taxation—not only in Washington, but as far away as New York and California. *See* Section III, *infra*. Such an exemption, if recognized, could impair state efforts to collect lawful taxes by shifting the incidence of such taxes off-reservation, such as Washington's choice to tax fuel off-reservation when removed from fuel terminals or when it enters the State, or other States' choices to tax distributors or suppliers of goods off-reservation.[2]

The *amici curiae* States may face significant tax avoidance if Yakama-owned companies act as distributors or suppliers of goods to tribal retailers on other reservations in a State that has shifted the incidence of its taxes off-reservation to, for example, first possession of goods within a State. Such goods would go untaxed if, as the Washington court concluded, the right

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[1] Treaty with the Yakamas, June 2, 1855, art. III, 12 Stat. 951, 952–53 (1859); Treaty with the Nez Perces, June 11, 1855, art. III, 12 Stat. 957, 958 (1859); Treaty with the Flatheads (Treaty of Hell Gate), July 16, 1855, art. III, 12 Stat. 975, 976 (1859).

[2] *See, e.g.*, Idaho Code § 63-2508 (cigarette stamps to be "affixed by person first receiving cigarettes in state"); Idaho Code § 63-2402 (fuel tax "due and payable upon receipt of the motor fuel in this state by the distributor"); Cal. Rev. & Tax. Code § 30123(b) ("[t]here shall be imposed upon every distributor a tax upon the distribution of tobacco products"); Wash. Rev. Code § 82.38.030 (fuel tax levied and imposed when fuel enters state or is removed from rack at refinery or terminal); New York Tax Law § 471(2) (requiring tax-stamp agents to pay taxes on cigarettes in the first instance).

to travel prohibits taxation of goods merely because those goods are being transported by Yakama tribal members. As the Petitioner shows, such a result cannot be reconciled with the treaty language here. But the *amici* States are also concerned that the Yakama arguments undermine this Court's holdings that shifts in a tax's legal incidence to off-reservation locations are not only permissible, but necessary for effective administration of state tax laws. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 460.

The *amici curiae* States have a strong interest in affirmation of this Court's oft-repeated acknowledgment of the need for "bright-line" standards with regard to taxation of tribal members once outside the bounds of a federally-recognized Indian reservation. Those bright-line standards are undermined if exceptions are crafted through interpretation of treaty terms to create tax-exempt, off-reservation rights not plainly expressed on the face of the treaty.

SUMMARY OF THE ARGUMENT

It is generally the case that within Indian reservations and other lands set aside in trust for their occupancy, tribes and tribal members possess immunity from generally applicable state revenue laws, including state taxes, absent congressional consent. *Mescalero Apache Tribe*, 411 U.S. at 148.

But when tribal members go off-reservation, the general rule of immunity from state taxation flips, and

both tribal members and goods in their possession are subject to nondiscriminatory, generally applicable state laws absent "express federal law to the contrary." *Id.* at 148–49. Together, these rules mean that in Indian taxation cases a frequently dispositive issue is whether the legal incidence of the tax attaches to a tribal member on- or off-reservation. If the latter, then state tax law will apply unless there is a federal law that speaks with sufficient clarity to qualify as an "express" prohibition of state taxation authority.

In the present dispute, the parties agree that the legal incidence of Washington's motor fuels tax is imposed outside the Yakama Reservation when fuel is removed from the bulk system from sources in Washington, or when fuel enters the State, irrespective of whether such fuel is transported over the public highways. Cougar Den, Inc., owned by a tribal member, nonetheless asserts immunity from taxation based on a treaty provision guaranteeing Yakama tribal members "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakama Nation, art. III, 12 Stat. at 952–53. The Washington Supreme Court agreed, and in so doing essentially crafted an immunity from taxation for any activity constituting "trade," despite the lack of any reference to "trade" in the plain language of the treaty. The court's holding contradicts this Court's case law requiring an express federal statute to abrogate a State's tax authority. The Washington court then compounded its error by disregarding a prior federal court decision that concluded that the 1855 treaty does not

expressly confer a right to engage in trade that would preempt state taxation or regulation of goods in the possession of Yakama tribal members outside Indian country. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) (finding no separate "right to trade in the Yakama Treaty").

The reasoning of the decision below may encourage members of the Yakama Nation and other tribes with similar treaty language to adopt business models that allow them to "market" their exemption from taxation in order to deliver goods to tribal retailers nationwide, free of the prepayment of state taxes that would otherwise apply. The decision below is but one example: California and New York have both been embroiled in disputes with Yakama tribal members asserting that the treaty right to travel immunizes them from payment of taxes on cigarettes or fuel bound for Indian reservations in those States.

This Court should reaffirm that treaty terms defining off-reservation rights, such as the Yakama Treaty's plain statement of the right to travel upon public highways, should not be expanded beyond their natural meaning to the derogation of the States' jurisdiction over tribal members' commercial activities outside the sphere of Indian country. Off-reservation treaty rights can coexist with state sovereign jurisdiction "when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999), but respect for state sovereignty demands that preemption of state taxation

powers be expressed on the face of the treaty, not crafted through reconstruction of tribal understanding.

ARGUMENT

I. ONLY "EXPRESS" FEDERAL LAWS ARE SUFFICIENT TO EXEMPT TRIBES OR THEIR MEMBERS FROM APPLICATION OF NONDISCRIMINATORY STATE TAX LAWS WHEN OFF-RESERVATION.

This Court has established a firm dichotomy for addressing state authority to tax the activities of tribal members on and off federally-established reservations. While in some circumstances determining the bounds of state jurisdiction over tribal members requires a balancing of federal, state, and tribal interests, *see, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). On-reservation, "'[a]bsent cession of jurisdiction or other federal statutes permitting it,' [the Court has] held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *Mescalero Apache Tribe*, 411 U.S. at 148). Off-reservation, the mirror-image rule applies: tribal members are generally subject to state regulation and taxation, unless state police powers are

preempted by an "express federal law to the contrary." *Mescalero Apache Tribe*, 411 U.S. at 148–49.

These "bright-line standards" are intended to provide the certainty necessary for efficient administration of state tax laws. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 460. This Court's cases make clear that the Washington Supreme Court's expansive interpretation of the 1855 treaty is at odds with the principle that states are free to impose generally applicable taxes on off-reservation tribal activity absent an "express" federal law to the contrary.

For example, *Mescalero Apache Tribe* involved a challenge to application of New Mexico's gross receipts and use taxes to an off-reservation, tribally-owned ski resort located on federal land. 411 U.S. at 146. With regard to the State's tax on ski lifts permanently affixed to the tribally leased land, the Court found the requisite express federal prohibition in Section 5 of the Indian Reorganization Act of 1934 ("IRA"), then codified as 25 U.S.C. § 465.[3] Section 5 exempts from state and local taxation "any lands or rights acquired" under the IRA by the United States on behalf of a tribe or Indian. The Court reasoned that the "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." 411 U.S. at 158.

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[3] Section 5 of the IRA is now codified, in relevant part, at 25 U.S.C. § 5108.

The Court declined, however, to extend Section 5's taxation exemption to income derived from operation of the ski resort, *id.*, even though the income was generated from, and dependent upon, the tax-exempt, off-reservation property—indeed, the very purpose for tribal possession of the property was to generate such income.

The lesson of *Mescalero Apache Tribe* is that an off-reservation commercial activity is not tax-exempt merely because the "land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156. The Washington Supreme Court failed to apply this principle when it concluded that trade requires travel, and thus shares in any tax or fee exemption that applies to such travel. As demonstrated by *Mescalero Apache Tribe*, however, income-generating activities that employ tax-exempt property are not themselves tax-exempt. By the same token, trade in goods that employs a treaty-protected right to transport the goods should not be exempted from state taxation or other regulation.

Likewise instructive is *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), where this Court, citing its "categorical approach" to taxation issues, *id.* at 458, rejected a tribe's assertion that a treaty provision should be liberally interpreted to bar the State from taxing income of tribal members employed by the tribe but domiciled off-reservation. The tribe relied upon a provision that secured to the tribe "'the jurisdiction and government of all the persons and property that may be within their limits west, so that

no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws. . . .'" *Id.* at 465 (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333–334). The Court made short work of the argument by focusing on the treaty's unambiguous text:

> By its terms, the Treaty applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.

Id. at 466 (bracketed material in original).

Just like *Mescalero Apache Tribe, Oklahoma Tax Commission v. Chickasaw Nation* demonstrates that when the incidence of the tax falls on a tribal member outside the geographical limits of a reservation, a court cannot create an exception to such tax based on inference. Only an express exemption is sufficient to preempt taxation. "This Court has repeatedly said that tax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). *Oklahoma Tax Commission v. United States* addressed the application of state estate taxes

to cash and securities held by the United States for a tribal member, and subject to restrictions on alienation. 319 U.S. at 600. The Court held that Congress, by restricting alienation of the cash and securities, "cannot be supposed by implication to have prohibited estate taxes," because if Congress intends to preempt the state from levying "a general non-discriminatory estate tax applying alike to all its citizens," Congress "should say so in plain words." 319 U.S. at 606–07. Such reasoning applies, with even greater force, to taxes whose incidence falls on tribal members or entities for activities outside the reservation.

Other than the use tax in *Mescalero Apache Tribe*, the *amici* States know of no case where this Court has held preempted a state tax imposed on a tribe or tribal member where the legal incidence attached to activities occurring off-reservation. It is beyond cavil that this Court's requirement that tax exemptions be "express"—or its alternative formulation of "unmistakably clear" (*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985))—demands, if not explicit language preempting otherwise extant off-reservation taxing authority, a treaty or statutory provision whose application necessarily precludes the States' exaction of fees as a prerequisite to the enjoyment of the off-reservation right explicitly reserved by the tribe. *See, e.g.*, *Tulee v. State of Washington*, 315 U.S. 681, 685 (1942) (State could not impose license fee on Indians exercising right to fish at usual and accustomed fishing places because such fee was effectively "a charge

for exercising the *very right* their ancestors intended to reserve") (emphasis added).

Time after time, this Court, in a wide variety of contexts, has not only adhered to *Mescalero Apache Tribe's* categorical holding that Indians going beyond reservation boundaries are "subject to any generally applicable state law," but has emphasized the breadth of state authority over off-reservation Indians.[4] The Washington court failed to apply such precedents employing the clear rule laid down in *Mescalero Apache Tribe*. Indeed, other than a fleeting reference to *Mescalero Apache Tribe* at the beginning of its legal analysis, *Cougar Den, Inc.*, 392 P.3d at 1016, the majority opinion disregarded the necessity of an "express" exemption from state law—a necessity demanded by respect for state sovereign authority over tribal members outside Indian reservations. The Washington

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[4] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034–35 (2014) (emphasizing the various ways in which Michigan could apply its civil and criminal laws to an off-reservation casino); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) (citing *Mescalero Apache Tribe* and rejecting the Tribe's assertion that the courts should apply an interest-balancing test to a state motor fuel tax whose incidence fell on an off-reservation distributor because the asserted immunity was inconsistent with "our efforts to establish 'bright-line standard[s]' in the context of tax administration") (quoting *Arizona Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32, 37 (1999)); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (distinguishing *Mescalero Apache Tribe* based on the status of trust land as Indian country with respect to imposition and collection of cigarette tax on sales to tribal members).

Supreme Court's decision is thus at odds with this Court's precedents and must be reversed.

II. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE YAKAMA TREATY'S RIGHT-TO-TRAVEL PROVISION EXTENDS THE CANONS OF CONSTRUCTION FAVORING INDIAN TRIBES FAR BEYOND THEIR INTENDED APPLICATION.

While the Washington court cited *Mescalero Apache Tribe*, it failed to apply its rule that federal exemptions from state taxation for tribal members outside their reservation must be "express." 392 P.3d at 1016. Instead, it purported to employ canons of construction requiring the terms of a treaty to be "'carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the [treaty] council.'" *Id.* (quoting *Tulee*, 315 U.S. at 684). Over the State's objection that the plain language of the right to travel did not bar state taxation of goods simply because they are "incidentally brought over a highway," *id.*, the court determined that the Yakama Nation negotiators would have intended to reserve both "the right to use future roads and to trade their goods." *Id.* at 1017. The court's finding of a right to trade, which does not appear on the face of the treaty, not only ignored this Court's requirement that off-reservation exemptions from state jurisdiction be "express," it also misapplied traditional canons of construction applicable to treaties with Indian Nations.

The canons date back at least to Justice McLean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where he stated that "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.* at 582 (McLean, J., concurring).

While the canons provide for a "more extended meaning" of treaty terms, they cannot be used to *add* terms to a treaty. Addressing Justice McLean's comments in *Worcester*, this Court has cautioned that "the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. . . . We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). Accordingly, "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979)). In the end, the canons of construction are

fulfilled if the Court is satisfied "that the Government has performed all that it promised." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947).

In light of this Court's rule that treaty language is to be construed in accordance with the tenor of the treaty, the right-to-travel provision in the first paragraph of Article III of the Yakama treaty must be read in the context of its accompanying provisions. In the preceding portion of the first paragraph of Article III, the treaty parties unambiguously limited the exchange of promises to road- or highway-related matters. The Yakamas accepted the Government's right to establish roads "for the public convenience" through the reservation—to which the Yakamas otherwise had exclusive occupancy rights under Article II[6]—but reserved (1) "the right of way, with free access from the [reservation] to the nearest public highway," and (2) "the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at

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[6] In relevant part, Article II provides with respect to the land set apart for tribal occupancy:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

12 Stat. at 952.

952–53. In short, the topics in the first paragraph are limited to the use of roads and highways. *Id.* at 953.

The second paragraph then identifies specific rights that the Yakamas may exercise during their travels outside the reservation—i.e., the exclusive right of taking fish from streams on or bordering the reservation; the right of taking fish "at all usual and accustomed places, in common with the citizens of the Territory"; the right to erect temporary buildings for fish curing purposes; and hunting, gathering and pasturing rights "upon open and unclaimed lands." *Id.* at 953.[6] There is no ambiguity with respect to the activities for which the Yakamas reserved off-reservation rights under Article III. When all provisions in Article III are read together, the obvious conclusion, drawn from the plain language, is that the Nation reserved the right to travel to and from the reservation and the right to exercise certain enumerated rights at locations reached by means of such travels. Conspicuously absent from the enumerated rights is any expression of intent that off-reservation trade or commerce that uses

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[6] In its entirety, the second paragraph of Article III reads:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

12 Stat. at 953.

highways would be unregulated or untaxed by the governments of the United States.

Such absence is reflected in the decision of the Washington Supreme Court, which did not purport to find a right to trade in the plain treaty language. Rather, the Washington court found such exemption to exist only in the description of treaty negotiations made by the federal district court in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). There, the district court had found that:

> [F]ar-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture. . . . Travel was particularly important for the purpose of trade . . . the Yakamas traded goods, such as dried salmon, at various tribal trade centers throughout the Northwest and beyond. . . . The Yakamas' way of life depended on goods that were not available in the immediate area. . . . Yakamas also traveled for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes.

955 F. Supp. at 1238–39.

The *Cree* findings do nothing more than demonstrate that trade was one among many of the purposes served by the right to travel. The Washington Supreme Court then went on, however, to conflate such *purpose* of the right to travel with the *meaning* of the term "travel." The fact that the Yakamas reserved a right to travel "for the purpose of trade" and other purposes, *id.* at 1238, does not fairly imply that either the Yakamas

or Congress understood the term "travel" to include all activities, such as trade, that tribal members engaged in while traveling. Had the parties so intended, the second paragraph in Article III, which reserves the right to engage in certain location-related subsistence practices, would have been unnecessary. The fact that the parties felt the need to identify those off-reservation activities specifically reserved makes clear that the right to trade was not encompassed in the treaty, and further illustrates that the Washington Supreme Court reached its decision only by essentially rewriting the treaty to supply such right. *See United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) ("in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words").

The Washington Supreme Court's inferred off-reservation trading right when using highways not only contradicts this Court's bright-line rules for preempting state taxation; it ignores one of the primary purposes that led the United States to negotiate treaties with Indian tribes. *See* Charles Wilkinson, *American Indians, Time, and the Law* 101 (Yale Univ. Press 1987) (In treaty negotiations, "[t]he United States was also a surrogate for future states. It wanted to remove the cloud of Indian sovereign control . . . so that new states could govern most lands within their boundaries free of complications with Indians").

In short, the plain language of Article III, as interpreted using the canons of construction, supports the conclusion that the right to travel does not create a right to trade goods free of state regulation and taxation simply because the goods will, at some point, be transported over public roads. In fact, this exact line has been drawn by the Ninth Circuit Court of Appeals, which has affirmed the right of States to impose fees on off-reservation trade by the Yakamas, whether or not incidentally tied to travel, while striking down state taxes and fees that directly condition the actual transportation of goods. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There, the Ninth Circuit recognized that Article III does not create an independent right to trade: "[a]s shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* at 997. In *King Mountain Tobacco*, a tribal member-owned company shipped unblended tobacco from the reservation to North Carolina for processing and then shipped the blended product back to the Yakama Reservation in its own trucks. *Id.* at 991. The court concluded that the fact that tobacco had to travel over public highways did not exempt the tribal member from paying a state-mandated flat-fee payment into an escrow fund to offset smoking-related health care costs in the event of insolvency by certain cigarette manufacturers, stating flatly that "there is no right to trade in the Yakama Treaty." *Id.* at 998.

In contrast to the decision below, the *King Mountain Tobacco* decision follows this Court's admonition that "[t]he Indian canon of construction 'does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.'" *Id.* at 998 (quoting *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)). The *amici* States urge this Court to once again affirm that if the application of a generally applicable state law to off-reservation tribal members is to be preempted, Congress must say so in plain and unambiguous terms.

III. EXPANSION OF THE RIGHT-TO-TRAVEL PROVISION TO PROHIBIT TAXES ON YAKAMA-TRANSPORTED GOODS THREATENS THE BRIGHT-LINE STANDARDS ESSENTIAL TO ADMINISTRATION OF STATE TAX LAWS.

Despite this Court's clear precedents, the Washington court relied upon strained inferences from historical context, recited in a different case, to create *sub silentio* an entirely new off-reservation right to trade, immune from non-discriminatory state regulation. If allowed to stand, the Washington court's decision could have far-reaching consequences for the tax collection efforts of all States that import goods from businesses associated with the Yakama and the two other tribes that have treaties with identical right-to-travel language. In essence, all the nation's highways would become tax immunity zones for Yakama-owned businesses.

For example, in 2008, California's tax agency determined that First American Petroleum, a Yakama member-owned fuel importer, owed taxes on motor vehicle and diesel fuel imported from Nevada to its tribal customers in California. *See* Petition for Review, *First American Petroleum, LLC v. Superior Ct., et al.*, Case No. S248433, at 15 (Cal. S. Ct. Apr. 23, 2018) (hereinafter First American Petition for Review).[7] Under California's motor vehicle and diesel fuel tax laws, which are similar to Washington's, the incidence of tax is imposed on the importer or owner of the fuel outside the Yakama reservation when fuel is removed from the bulk system from sources in California, or when fuel enters California. Cal. Rev. & Tax. Code §§ 7301 *et seq.* & 60001 *et seq.* First American Petroleum continues to challenge California's imposition of this tax on the ground it violates First American Petroleum's right to

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[7] In relevant part, the Petition filed by First American Petroleum, LLC, which is not available online, asserts as follows:

> The [Board of Equalization] imposed fuel taxes on First American for transporting fuel from Nevada to its tribal customers in California. . . . This fuel tax violates First American's rights guaranteed by the United States in its Treaty of 1855 with the Yakama Nation. I PE 5:163-70; *Salton Sea Venture, Inc. v. Ramsey* (S.D. Cal. Oct. 18, 2011) No. 11-cv-1968-IEG (WMC), 2011 U.S. Dist. LEXIS 120145, at *20; *Cougar Den, Inc. v. Dep't of Licensing* (Wash. 2017) 392 P.3d 1014, 1020.

First American Petition for Review at 15. The cited litigation and appeal concern First American Petroleum's request for records after California's tax agency issued determinations that First American Petroleum owed taxes. The litigation was brought under California's Public Record Act; it is not a tax refund action. First American Petition for Review at 14.

transport fuel under the Yakama Treaty. *See* First American Petition for Review at 15.

First American Petroleum also relies on an unfair business competition case out of the Southern District of California. In *Salton Sea Venture*, brought by a private fuel retailer against First American Petroleum and its owner, Robert Ramsey, First American Petroleum succeeded in convincing the court that the Yakama Treaty allowed it to import fuel into California without complying with the motor vehicle and diesel fuel tax laws. This allowed the tribal retailer who received the fuel to sell it to nonmembers at a gas station within a California Indian reservation at a lower price than off-reservation private competitors. *Salton Sea Venture, Inc. v. Ramsey*, No. 11-cv-1968, 2011 WL 4945072 at *8 (S.D. Cal., Oct. 18, 2011). In so ruling, the court rejected a tax opinion issued by California's tax agency concluding, correctly in the *amicis'* view, that the right to travel did not apply when the incidence of taxation fell upon the goods themselves, and not upon the transportation of the goods. *Id.* at *7 (discussing agency's March 9, 2011 tax opinion).

Ten years after California first sought to impose its fuel tax, First American Petroleum has not paid the tax and, based on the Yakama Treaty, *Salton Sea*, and now *Cougar Den*, continues to challenge its tax liability in an ongoing dispute with California. *See, e.g.*, First American Petition for Review at 15.

Many other States have similar fuel-tax regimes that could be affected by the Washington Supreme Court's decision.[8]

The States' ability to collect cigarette taxes may also be imperiled if this Court allows the Washington Supreme Court's decision to stand. All 50 States and the District of Columbia impose excise taxes on cigarettes.[9] In New York, as in many other States, such taxes are a crucial part of the State's response to the public health costs associated with tobacco use, which kills over 26,000 people per year in New York alone.[10]

In New York, all cigarettes delivered into the State for resale must be sent initially to state-licensed stamping agents, who buy and affix tax stamps, incorporate their value into the sale price, and pass the cost along down the chain to the consumer, who bears the ultimate liability for the tax.[11] *See* New York Tax Law

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[8] *See, e.g.*, Fed'n of Tax Admins., *State Motor Fuel Tax Points of Taxation* (Jan. 27, 2012), https://old.taxadmin.org/fta/rate/tax_stru.html (last visited Aug. 2, 2018).

[9] *See* Centers for Disease Control and Prevention, Map of Excise Tax Rates on Cigarettes as of June 30, 2018, https://www.cdc.gov/statesystem/excisetax.html (last visited Aug. 2, 2018).

[10] N.Y.S. Dep't of Health, Bureau of Tobacco Control, *Tobacco is the Leading Cause of Preventable Death*, StatShot Vol. 8, No. 3 (Apr. 2015), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume8/n3_tobacco_leading_cause.pdf (last visited Aug. 2, 2018).

[11] The current tax is $4.35 per pack of cigarettes. *See* New York Tax Law § 471(1); N.Y. Comp. Codes R. & Regs. tit. 20, § 74.1(a)(2).

§ 471(2); N.Y. Comp. Codes R. & Regs. tit. 20, §§ 74.2-74.3.

In litigation against New York State and the City of New York, another Yakama-based business has invoked the reasoning employed by the Washington Supreme Court as a basis for exempting it from the State's cigarette-tax regime, including the requirement that all cigarettes be delivered to stamping agents.[12] If this Court were to accept that reasoning, then Yakama- and other, similarly situated tribal cigarette sellers would be able to ship significant quantities of untaxed cigarettes into New York and other States. Such an influx of untaxed cigarettes would increase cigarette use by eliminating the deterrent effect caused by taxes.[13] It would also reduce the excise tax revenue New York collects—revenue on which it depends to recoup some of the extraordinary health care costs associated with tobacco use.[14]

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[12] *See, e.g.*, Opening Br. and Special Appendix of Defendant-Appellant-Cross-Appellee 53, *State of New York v. Mountain Tobacco Co.*, Nos. 17-3198, 17-3222 (2d Cir. Feb. 20, 2018); Letter at 2, *City of New York v. King Mountain Tobacco Co., Inc.*, No. 10-cv-05783 (E.D.N.Y. Nov. 3, 2011).

[13] *See* U.S. Office of Surgeon General, *The Health Consequences of Smoking – 50 Years of Progress* 788 (2014), http://www.surgeongeneral.gov/library/reports/50-years-of-progress; RTI Int'l, *2014 Independent Evaluation Report of the New York Tobacco Control Program* ("RTI Report") 22 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

[14] Annual healthcare costs associated with tobacco use in New York alone exceed $10 billion, a third of which is paid by Medicaid. *See* N.Y.S. Dep't of Health, Cigarette Smoking and

New York could also lose additional revenue because an influx of untaxed cigarettes could reduce the payments New York receives from cigarette manufacturers participating in the Master Settlement Agreement (MSA). Under the MSA, participating cigarette manufacturers—none of which are currently tribal manufacturers—are required to make annual payments to New York (and other States) to help defray the public health costs of tobacco use.[15] Under a 2015 settlement agreement with New York, participating manufacturers receive a credit against their annual payment obligations based on the volume of untaxed tribal cigarettes sold in New York that the State has sovereign authority to tax.[16] Thus, allowing Yakama and other tribal businesses to sell more untaxed cigarettes in New York will directly diminish the State's MSA payments.

The above-described situations are but examples of the harms that the decision below threatens to cause *amici* States, and underscore the need for this Court to correct the Washington Supreme Court's deviation

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Other Tobacco Use, https://www.health.ny.gov/ prevention/tobacco_ control (last visited Aug. 2, 2018); RTI Report, *supra*, at 25.

[15] Master Settlement Agreement, § IX(c), https://oag.ca.gov/ tobacco/msa (last visited Aug. 3, 2018).

[16] *See* Settlement Agreement § III.C.2(a), https://ag.ny.gov/ NPM-Settlement (last visited Aug. 3, 2018) ("For 2015 and each year thereafter, the [participating cigarette manufacturers] shall receive a credit for each Tribal [ ] Pack on which New York did not collect New York Excise Tax that was sold during that year to New York consumers").

from this Court's case law, and to limit Article III to its plain terms.

CONCLUSION

The decision of the Washington Supreme Court should be reversed.

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No. 16-1498

In the
Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondents.

On Writ of Certiorari to the
Supreme Court of Washington

BRIEF OF *AMICI CURIAE* MULTISTATE TAX COMMISSION AND FEDERATION OF TAX ADMINISTRATORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The Multistate Tax Commission (the Commission) submits this brief as *amici curiae* in support of the petitioner, the Washington State Department of Licensing (the Department).[1]

The Commission is an intergovernmental state tax agency made up of the heads of the tax agencies for the states that have enacted the Multistate Tax Compact. In addition to the sixteen compact members, states may participate in the Commission's activities as sovereignty or associate members.[2]

The Commission's purposes include facilitating the proper determination of state and local tax liability of multistate taxpayers and promoting uni-

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Washington. This brief is filed with the consent of both parties.

[2] Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. Associate Members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming.

formity or compatibility in significant components of tax systems.[3]

The Federation is the membership organization for state revenue agencies. Previously known as the National Association of Tax Administrators, the Federation has been operating since 1937. The members of the Federation are all 50 states, the District of Columbia, and the cities of New York and Philadelphia. The primary purpose of the Federation is to promote best practices in state tax administration and tax enforcement. The Federation accomplishes this purpose primarily through educational, information-sharing, and other cooperative programs.

This brief will not attempt to parse the relevant historical record or address the rules of construction applicable to Native American treaties. And while we agree with arguments made by the Department and its other *amici*, we do not seek to duplicate them. Instead, we write to make the Court aware of the ongoing work of state tax administrators and taxpayers to create uniform tax systems for collecting and administering fuel and tobacco taxes on products sold across state lines. The Washington Supreme Court's interpretation of the treaty provision at issue here casts a shadow of uncertainty over

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[3] *See* Art. I of the model Multistate Tax Compact, *available at*: http://www.mtc.gov/The-Commission/Multistate-Tax-Compact (last visited Aug. 8, 2018).

that work. We seek greater clarity from this Court about the treaty provision at issue here and we believe, ultimately, the Court must conclude that the Washington Supreme Court's interpretation is fundamentally flawed.

SUMMARY OF ARGUMENT

No one disputes the Ninth Circuit precedent that applies in this case—only how to apply it. If the Washington Supreme Court's ruling is upheld, there is little doubt that other states and other taxes will be impacted, although precisely how is, at this point, anyone's guess. The two taxes most likely to be affected are state fuel and tobacco taxes.

The states' fuel and tobacco tax systems have developed over time to allow tracking of interstate sales and cross-border shipments and to subject these products to tax (and administrative requirements) in the state where they will be consumed, while collecting the tax prior to the final sale. States and taxpayers are continually working to create greater compatibility and consistency in numerous aspects of these systems including record-keeping and reporting—all the elements that have a real and practical effect on compliance and administration.

The respondent has asserted that any effects of the ruling below on these state tax systems can be remedied by the states through legislative amendments to those systems. There is no clear path to achieve such a fix, however, and even if there were, the scope of the treaty right created by the decision

below is so uncertain that any changes states might make would have no guarantee of being effective.

Indeed, serious consideration of the need for greater clarity and where it might come from reveals the fundamental flaw in the Washington Supreme Court's holding—which is that it extends the treaty provision beyond the support of any coherent rationale. We do not believe, therefore, that the Court can both affirm the decision below and provide that clarity. We urge the Court to reject the former, and to do the latter.

ARGUMENT

I. Upholding the decision below will affect other states and potentially other taxes—but will especially impact the states' fuel and cigarette tax systems.

For an eight-month period in 2013, the Department determined that unpaid special fuels and motor vehicle fuel taxes in this case amounted to $3,639,954.61. Joint Appendix, 12a. For two subsequent two-month periods, the amounts due were $1,137,337.68 and $1,129,701.25 respectively. *Id.* at 20a and 24a. The effects on other Washington taxes, as well as on states and their taxes, are much harder to estimate or predict. And that's the problem.

One thing is certain—the treaty language at issue is not geographically bounded.[4] So while the travel provisions at issue in this case are only found in the treaties between the United States and three tribes, the tax implications of the decision could affect every state to the extent those tribes make protected use of roads to conduct trade in those states.[5] The Yakama have, for example, asserted that the treaty travel provision bars New York from enforcing its regulatory scheme for untaxed cigarettes. *New York v. Mountain Tobacco Co.*, 953 F. Supp. 2d 385, 391 (E.D.N.Y. 2013)(noting that New York introduced evidence to rebut the tribal seller's theory that the treaty prohibited the state regulation at issue).

Recognizing the unlimited geographic scope of the treaty, the California State Board of Equalization (the BOE) issued a Tax Opinion in 2011 and acknowledged that the Yakama treaty applies to the use of California roads by the tribe.[6] In that opinion,

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[4] "[T]he right in common with citizens of the United States, to travel upon all public highways." Art. 3, Para. 1, Treaty with the Yakama (1855) (emphasis added).

[5] The right to travel provisions are found in the treaties between the Yakamas, the Flathead and the Nez Percés. Treaty with the Flatheads, 12 Stat. 975 (July 16, 1855, ratified March 8, 1859, proclaimed April 18, 1859); Treaty with the Nez Percés, 12 Stat. 957 (June 11, 1855, ratified March 8, 1859, proclaimed April 29, 1859); Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859).

[6] BOE Tax Opinion 10-475 (March 9, 2011), *available at* https://www.standupca.org/tribal-

the BOE opined, however, that California was not precluded by the treaty from imposing its prepaid sales tax and gasoline and diesel fuel excise tax on a Yakama importer of fuel into California for sale on Native American reservations. The BOE relied on the Ninth Circuit cases implicated in this case. The BOE decision would be overruled should this Court affirm the Washington Supreme Court decision.[7]

There are likely other equally clear examples of the potential impact of the decision on other states as well as theoretical impacts that go far beyond these examples. Suffice it to say, as the dissent below points out, the logic of the Washington Supreme Court decision is by no means limited to fuel or cigarette taxes. That same logic could arguably be extended to any tax imposed on a Yakama business

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gaming/taxation/March%209%2C%202011%20BOE%20Response%20-%20Tribal%20Gas%20Stations.pdf/at_download/file (last visited Aug. 3, 2018).

[7] In a somewhat different context, the BOE estimated that the sale of non-taxable gasoline on one reservation reduced state taxable revenue by $1.5 to $2 million per year. Notice of Appeal by Interested Parties, In Re Notice of Decision Upon the Application of the Tule River Tribe of California, dated January 6, 2011, Department of the Interior, Bureau of Indian Affairs, Board of Indian Appeals, n. 5, *available at* https://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/tule-river-indian-tribe-1/IBIA%20Appeal.pdf/at_download/file (last visited Aug. 3, 2018). The revenue effects of an affirmance in this case would apply to all taxable fuel sales in non-Indian country, throughout the state.

that must use the roads in order to conduct its operations and activities. It is unclear whether the same logic employed by the court below would prevent New York from imposing its sales tax or its income tax on a Yakama business that delivers Yakama manufactured furniture or Yakama artwork in New York via the Lincoln Tunnel or the George Washington Bridge.

Nevertheless, because the decision will indisputably affect state fuel and tobacco taxes, we will focus on those tax systems.

II. State fuel and tobacco tax systems are highly interconnected and state administrators and taxpayers have worked together to achieve greater administrative uniformity.

Given that multiple companies may be involved in the sales of fuel and tobacco products (producers or growers, refiners or manufacturers, transporters, wholesalers, distributors, retailers, etc.), and given that the goods may transit multiple states before they are consumed, it is critical that this system work properly so that noncompliant sellers do not gain a competitive advantage by avoiding taxes, and so that the administrative and enforcement costs that might otherwise be imposed by multiple states are minimized.

In the fuel tax area, the Federation of Tax Administrators has "developed and continues to foster a very unique and very effective partnership

among the States, Industry, Federal and Foreign Governments regarding motor fuel tax administration."[8] As a recent report explains:

> Although there are many similarities, each state has its own unique set of tax laws, tax rates, report forms, definitions, exemptions, and compliance methods. These differences create problems in tax administration, regulation of interstate fuel movement, enforcement efforts and exchange of information among state revenue agencies and provide tax cheats with incentives to evade state fuel taxes. Federal Highway Administration (FHWA) studies show that gasoline tax evasion ranges from 3 to 7 percent of gallons consumed, and diesel tax evasion ranges from 15 to 25 percent. This means the states may be losing more than $2 billion annually to evasion.[9]

Unlike general sales taxes, fuel taxes are generally collected prior to the retail sale, a system which requires states and industry to cooperate on the

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[8] Report of the FTA Uniformity Committee (The Uniformity Book) - updated September 2017; Benefits of Motor Fuel Tax Section Activities, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/2017%20Uniformity%20Book.pdf (last visited Aug. 7, 2018).

[9] *Id.* at 1.

treatment of cross-border reporting, but has the advantage of being less susceptible to abuse. Uniformity also allows states to share information to ensure that taxes are being properly reported on cross-border sales. For example, almost all states receive fuel export or import information from the origin or destination states, respectively.[10]

Similarly, in the tobacco and cigarette tax areas, states have worked, in conjunction with tobacco companies, to make sure that tax systems are compatible from state to state so as to reduce contraband trade in untaxed products and so that taxes can be reported and collected efficiently.[11] The role of tobacco taxes, of course, is not simply to raise revenue but also to discourage use, especially by teenagers, and provide for health and societal costs.

If this Court upholds the ruling below, it will create uncertainty as to whether states can maintain this interwoven system or will need to make changes to it, if possible.

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[10] *See* Federation of Tax Administrators, Fuel Tax Section, 2018 EC Survey – Map Summary at 13-14, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/_2018%20EC%20Survey%20MAPS.pdf (last visited Aug. 7, 2018).

[11] See Federation of Tax Administrators, Tobacco Tax Section, Uniformity Guide, *available at* https://www.taxadmin.org/assets/docs/Tobacco/TOBACCO%20UNIFORMITY%20GUIDE%2008.03.17.pdf (last visited Aug. 7, 2018).

III. The holding below is based on a fundamentally flawed rationale and makes it impossible for states to know what taxes might be preempted.

State tax administrators, along with industry groups and taxpayers, have focused on creating consistent processes and procedures for measuring, reporting, and keeping track of products and the taxes owed. But it must also be noted that, especially in the fuel tax area, the particular imposition of taxes may vary somewhat in terms of exactly when the tax is triggered and exactly how and when various persons may be responsible for reporting and paying it. The precise statutory terminology used may also vary, even among states that are recognized as taking the same basic approach.[12]

This is important because—while the Washington Supreme Court determined that the imposition of the tax by Washington fell afoul of the treaty provision—as the dissent suggests and the respondent contends, this could be viewed as a matter of in-

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[12] For example, a report by the Federation of Tax Administrators, Tobacco Tax Section, demonstrates how the handful of approaches to imposing the legal incidence of the tax may correspond to a particular state's approach to sales of fuel to or by tribes or tribal members. See Native American Survey—September 2017, *available at* https://www.taxadmin.org/assets/docs/MotorFuel/2017%20Complete%20Native%20American%20Survey.pdf (last visited Aug. 9, 2018).

terpretation.[13] It is true that other states might well interpret slightly different or even exactly similar statutory language differently. But that is not the source of the problem here. The source of the problem is that the holding of the Washington Supreme Court extends the precedent on which it relies beyond the breaking point—creating a distinction between allowable and prohibited taxes that will be impossible to implement. Rather than limiting the treaty provision's application to situations in which travel is unquestionably and directly the focus of the imposition, the court posits that there is a line to be drawn between improper taxes on "importation" and other taxes indirectly implicating travel that might be allowable. The court below concludes that:

> Here, travel on public highways is directly at issue because the tax was an importation tax. The fact that the tax is imposed at the border and is assessed regardless of whether Cougar Den uses the highway is immaterial because, in this case, it was impossible for Cougar Den to import fuel without using the highway.

Cougar Den, Inc. v. Dep't of Licensing, 392 P.3d 1014, 1019 (2017). The court's fundamental reasoning is that "it was simply not possible for Cougar

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[13] Supplemental Brief for the Respondent at 7.

Den to import fuel without traveling or transporting that fuel on public highways." *Id.* at 1020.

This may appear to be a clear line, until one reads the dissent. "Without travel, most goods have no market." *Id.* at 1024 (Fairhurst, C.J., dissenting).

So, while the respondent argues that states might be able to avoid the violating the treaty provision at issue by simply amending their statutory language, we agree with the U.S. Solicitor General that it is unclear whether this will be possible. The line drawn by the Washington Supreme Court defies the type of clarity that would be needed for states to know what taxes are allowed. Indeed, it is not clear that, under the court's logic, there is any way for states to continue to impose a fuel tax prior to the retail level that would not be prohibited.

Similarly, tobacco taxes, and cigarette taxes in particular, are typically imposed on and collected at the point those products are introduced into the state, by affixing on the packs state tax stamps, which show that the cigarettes have complied with state law.[14] Whether the state uses the term "import," or "brings or causes to be brought into," or "ships or transports into," the logic of the holding below would appear to prohibit those taxes—even though transportation, itself, has nothing to do with the focus of the tax.

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[14] *See supra*, note 12.

We therefore urge the Court not to adopt so extreme an interpretation, or one that cannot be consistently and predictably applied. State tax administrators cannot appeal to this Court for its review of any potential amendment that might be necessary nor can they litigate every challenge or seek this Court's opinion on every shading of difference that might possibly affect the outcome.

CONCLUSION

The respondent will no doubt urge this Court to ignore the effects of its holding on state tax systems as irrelevant to any determination of what the treaty provision means. But no law, not even treaties, exists in a vacuum. To be effective, the law must be sufficiently clear so that it can be properly carried out. The decision below fails to meet this basic standard. We therefore ask the Court to overturn the Washington Supreme Court and provide the clarity that all the parties need.

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WASHINGTON STATE DEPARTMENT OF LICENSING,
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On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1944, the National Congress of American Indians ("NCAI") is the nation's oldest and largest association of Native American and Alaska Native tribal governments, representing hundreds of federally recognized Indian tribes and many individuals. NCAI serves as a forum for consensus-based policy development among its member tribes from every region of the country. Its mission is to protect the rights of Indian tribes, to improve the welfare of American Indians, and to inform and to educate the public, the federal government and state governments about treaty rights, tribal self-government, and a broad range of public policy issues affecting Native nations, tribes and pueblos.

The issue in this case is whether the Yakama Treaty of 1855 – which guarantees "free access" from the Yakama Indian Reservation "to the nearest public highway," and "also the right, in common with citizens of the United States, to travel upon all public highways" – preempts the application of a Washington state fuel tax to fuel imported by a Yakama corporation into the Reservation from out of state over the public highways. The answer to that question turns on the nature and scope of the right to travel guaranteed by the 1855 Treaty, because Indian treaties are the supreme law of the land and thus

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amicus curiae* and its counsel made any monetary contribution toward the preparation and submission of this brief. Counsel of record for all parties gave their written consent to the filing of this brief.

preempt state laws that would constrain or abrogate treaty rights.

NCAI submits that the construction of an Indian treaty must ensure that the Indians receive the benefit of the bargain they negotiated in consideration for the extensive lands and rights they relinquished to the United States. This means that the treaty cannot be interpreted as a statute enacted by Congress would be read. Nor can it be read narrowly to maximize the State's taxing power. Instead, as this Court has held for nearly two centuries, a treaty must be read liberally as the Indians would have understood it under the circumstances, including the promises and assurances made during treaty negotiations by agents of the United States government.

STATEMENT OF THE CASE

1. This case involves the interpretation of an 1855 Treaty between the United States and the Yakama Nation in which the United States obtained the land necessary to establish the State of Washington. The specific question is whether the Treaty's "right to travel" provision prevents application of a Washington fuel tax to Cougar Den, a Yakama corporation that imports fuel into the Yakama Reservation from out of state over the public highways. The Washington Supreme Court held that imposing the fuel import tax would be inconsistent with the Yakamas' treaty right.

2. The "right to travel" provision, which is in Article III of the Treaty, provides:

> [I]f necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is

> secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

12 Stat. 951, 952-53 (1855).

The state fuel taxes at issue "are imposed at the wholesale level, when fuel is removed from the terminal rack or imported into the state." Pet. App. 4a (citing Wash. Rev. Code §§ 82.36.020(2), 82.38.030(7) (2007)). Assuming that these taxes would apply to Cougar Den's importation of fuel unless that would abridge the Indians' treaty rights, the Washington Supreme Court rightly focused on determining the Treaty's meaning, using the "rule of treaty interpretation" developed by this Court. Pet. App. 5a. It noted that "Indian treaties must be interpreted as the Indians would have understood them," and that "[t]reaties are broadly interpreted, with doubtful or ambiguous expressions resolved in the Indians' favor." *Id.* at 5a-6a (citations omitted).

3. To determine how the Indians would have understood the treaty right to travel, the court relied on the history of the provision, which was the subject of extensive fact-finding in *Yakama Indian Nation* v. *Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) ("*Flores*"), *aff'd sub nom. Cree* v. *Flores*, 157 F.3d 762 (9th Cir. 1998) ("*Cree II*"). The court noted that this approach is consistent with other federal court decisions that have relied on the historical record examined and established in *Flores* in assessing the nature and scope of the 1855 Treaty's right to travel. See Pet. App. 9a-15a (discussing *United States* v. *Smiskin*, 487 F.3d 1260, 1265-67, 1269-71 (9th Cir. 2007); *Cree II*, 157 F.3d at 774; *King Mountain Tobacco Co.* v. *McKenna*, 768 F.3d 989, 997-98 (9th Cir. 2014)).

The Washington Supreme Court summarized the *Flores* court's historical findings:

> [T]he treaty and the right to travel provision in particular was of tremendous importance to the Yakama Nation at the time the treaty was signed. Travel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes. Importantly, at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes. The court found that the record unquestionably depicted a tribal culture whose manner of existence was dependent on the Yakamas' ability to travel.

Pet. App. 7a (citing *Flores*, 955 F. Supp. at 1239). The *Flores* court further found that "agents of the United States knew of the Yakamas' reliance on travel," and that this "right to travel off reservation had been repeatedly broached" during negotiations, and "assurances were made that entering into the treaty would not infringe on or hinder their tribal practices" and that tribal members would retain the "'same liberties . . . *to go on the roads to market*" with "'no conditions attached.'" Pet App. 7a-8a (citing and quoting *Flores*, 955 F. Supp. at 1243, 1244, 1251).

4. The Washington Supreme Court concluded that "[i]n reliance on these vital promises," the "Yakamas forever ceded 90 percent of their land in exchange for these rights." Pet App. 8a. As the court explained, "[t]here was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation." *Id.* Significantly, "although the United States negotiated

with many Northwest tribes, only the treaties with the Yakamas and Nez Perce contained highway clauses like this one." *Id.* (citing *Cree II*, 157 F.3d at 772).

The Washington Supreme Court also rejected the Department's argument that the fuel taxes "are assessed based on incidents of ownership or possession of fuel, and not incident to use of or travel on the roads or highways." Pet. App. 13a. The court found that the tax directly affects "travel on public highways" because it is "*an importation tax*." *Id.* (emphasis added); see also *id.* at 14a ("the Department requires that companies obtain a license prior to hauling goods into the state: the purpose of the licensing requirement is to collect taxes").

The Washington Supreme Court therefore held that the tax cannot be applied to Cougar Den because it is a tax on "the importation of fuel, which is the transportation of fuel," and the treaty right to travel protects the Yakamas' right to "travel extensively for trade purposes." Pet. App. 16a.

SUMMARY OF ARGUMENT

For nearly two centuries, this Court has applied special rules of interpretation to Indian treaties that reflect the United States' obligation to honor and fully respect the commitments made to the Indian nations that relinquished the vast majority of their lands and other rights to the United States. The terms of Indian treaties are not to be construed strictly or as they would be understood by learned lawyers – either today or in the past – but liberally in the sense that they would have been understood by the Indians who lacked knowledge of the American legal system and could not even read the text of the treaty documents they signed with a mark. See *e.g.*, *Jones* v.

Meehan, 175 U.S. 1, 10-12 (1899). If there is doubt or ambiguity, it should be resolved in favor of the Indians to ensure that they receive the benefit of the bargain. See *infra* § I.A.

The United States as *amicus curiae* affirms these bedrock canons. United States Amicus Br. 13-14. The Department, however, appears to propose an entirely different canon: that Indian treaties must be interpreted more strictly to maximize the State's power to tax activity outside of Indian country. This proposal is without merit. Although this Court has cautioned that federal *statutes* should not be interpreted to provide a tax exemption unless the exemption is "clearly expressed," that is a canon of construction to help judges discern the intent of Congress in enacting the statute. The Court assumes that Congress intends taxes to be generally applicable, and thus will not interpret a statute to grant an exemption by implication.

But different rules apply to Indian *treaties*. In a case involving an Indian treaty, the question is not what Congress intended, but what the parties to the treaty intended. See, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* ("*Fishing Vessel*"), 443 U.S. 658, 661-62 (1979). Indian treaties are the supreme law of the land that, under the Supremacy Clause of the United States Constitution, preempt any state law that qualifies or negates treaty rights. This Court has long used the Indian treaty canons to determine the parties' intent about the scope of Indians' treaty rights, including in cases involving state taxation. See, *e.g.*, *Carpenter* v. *Shaw*, 280 U.S. 363, 366-67 (1930), and *infra* § I.B.

The Washington Supreme Court thus correctly held that to decide whether the right to travel provision in the 1855 Treaty preempts the imposition of state fuel

tax and licensing fees on a Yakama corporation that imports fuel to the Yakama Reservation over the public highways, it must apply the Indian treaty canons established by this Court. The court thus appropriately considered the text of the treaty, the history of the treaty negotiations, and the circumstances under which the treaty was adopted to determine how the Yakama Indians understood the right to travel. And because the history confirmed the clear import of the text – that the Indians would have understood any travel or importation that requires the use of the public highways is protected by the right to travel – the court properly held that the treaty precludes the Department from taxing the importation of fuel to the Yakama Reservation. See *infra* § I.C.

ARGUMENT

I. THIS COURT MUST DETERMINE THE 1855 TREATY'S MEANING USING RULES THIS COURT HAS APPLIED FOR CENTURIES

The Department and its *amici* essentially fault the Washington Supreme Court for failing to interpret the 1855 Treaty the way a court might interpret a statute enacted by Congress in 2018. They invoke the rule that "[i]f Congress wants to preempt state taxes, it must 'say so in plain words,'" Br. 20-21 (citation omitted), and argue that the Treaty cannot preempt the Washington import tax because its plain language "says nothing about a tax exemption." Br. 23; see also States' Amicus Br. 6-7 ("preemption of state taxation powers [must] be expressed on the face of the treaty"). The Washington Supreme Court correctly recognized, however, that Indian treaties are not statutes and that they are subject to different interpretive rules.

As discussed below, Indian treaties must be interpreted broadly, as the Indians would have understood them, with ambiguities resolved in the Indians' favor. And because Indian treaties are the supreme law of the land, state law is preempted where, as here, its application would qualify or abrogate Indian treaty rights reflected in the text and confirmed by the history of the treaty negotiations.

A. The Origins And Continuing Authority Of The Treaty-Interpretation Canons

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Fishing Vessel*, 443 U.S. at 675. "Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret treaties." *Id.*

For nearly two centuries, this Court has applied special rules of interpretation to determine the intention of the parties in Indian treaties. These interpretive rules arise directly from the United States' unique relationship with Indian nations and the United States' obligation to honor and fully respect the treaties in which tribes gave up the vast majority of their lands in reliance on the United States' solemn commitments, as the Yakama Nation did here. The rules reflect the reality that to determine the parties' intent, the court must understand the unique relationship between the United States and Indian nations and the context and nature of the negotiations that led to the treaty's text.

The canons specific to treaty interpretation are that the terms are construed "in the sense in which they would naturally be understood by the Indians," *Jones*, 175 U.S. at 11, and that ambiguities should be "resolved from the standpoint of the Indians," *Winters*

v. *United States*, 207 U.S. 564, 576 (1908). These cannons "are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

As Chief Justice Marshall explained in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832), Indians have, through various treaties, "placed themselves under the protection of the United States." Indian nations "look to our government for protection;" and the United States has an obligation to act as a guardian to them. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). As a result,

> [t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

Worcester, 31 U.S. at 582.

The Indian treaty canons also reflect this Court's recognition of the historical relationship between the parties and the circumstances under which the treaties were drafted and signed. One aspect of that relationship was the imbalance of power between the United States and the Indian nations, which resulted in agreements in which the tribes were forced to make vast concessions of tribal land, resources and autonomy. "[T]reaties were imposed upon [Indians] and they had no choice but to consent." *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

This Court has directly linked the coercive nature of the transaction and the important rights the tribes relinquished to the requirement that a treaty be read

as Indians would have understood it and with ambiguities resolved in their favor:

> [T]he document is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions. . . . "At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico . . . . In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country."

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) (quoting *Williams* v. *Lee*, 358 U.S. 217, 221 (1959)); see also, *e.g.*, *Choctaw Nation* v. *Oklahoma*, 397 U.S. at 630 ("these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of land in an arms-length transaction"). Application of the Indian canons is intended to ensure that Indian nations receive the benefit of their bargain in these inherently coercive transactions. See, *e.g.*, *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905) (Indian treaty canons "counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules'") (quoting *Choctaw Nation* v. *United States*, 119 U.S. 1, 28 (1886)).

The Indian treaty canons also address a second important aspect of the circumstances surrounding the execution of the treaties: the linguistic and cultural barriers to tribal understanding of the text drafted by officials of the United States government.

> In construing any treaty between the United States and an Indian tribe, it must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; ... .

Jones, 175 U.S. at 10-11.

As a result, "it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government." *Winters*, 207 U.S. at 577.

The "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones*, 175 U.S. at 11; see also *Fishing Vessel*, 443 U.S. at 676 (citing cases in which this rule of construction "has thrice been explicitly relied on by the Court in broadly interpreting the [1855 Treaty with the Yakama] in the Indians' favor"). Thus, courts must look "beyond the written words to the larger context that frames the [t]reaty, including 'the history of the treaty, the negotiations, and the practical construction adopted

by the parties.'" *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (quoting *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943)).

Of course, application of the Indian treaty canons does not lead to the conclusion that the proper construction must be different from the ordinary meaning of the language used. See, *e.g.*, *Choctaw Nation* v. *United States*, 318 U.S. at 432. Significantly, however, the Court has made clear that such meaning must be considered in conjunction with the Indians' understanding and historic circumstances of the adoption of a treaty. See *id.* (interpreting agreement "according to its unambiguous language" where there is no finding that "the two tribes intended to agree on something different from that appearing on the face of [the] agreement"); *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, 473 U.S. 753, 772 (1985) ("The historical record of the lengthy negotiations between the Tribe and the United States provides no reason to reject" the conclusion that the text "fairly describes the entire understanding between the parties"). Put differently, the canon requiring interpretation of a treaty as the Indians understood it in its historical context uniformly applies, although the canon requiring interpretation favoring the tribes does not apply (or may not be needed) if the treaty's meaning is clear in context.

B. The Treaty-Interpretation Canons Apply When Deciding Whether A Treaty Exempts Members Of A Tribe From Complying With State Law, Including Off-Reservation State Taxes

Citing *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), and *Chickasaw Nation* v. *United States*, 534 U.S. 84 (2001), the Department claims that a

treaty must expressly address preemption of state taxes. Br. 16; see also States' Amicus Br. 11-12. But those cases involved federal statutes, not a treaty like the 1855 Treaty at issue here. The Department's proposed canon cannot be squared with this Court's precedent involving Indian treaties.

Indian treaties, once ratified, are "the supreme law of the land." *Antoine* v. *Washington*, 420 U.S. 194, 204 (1975). "State qualification of [Indian treaty] rights is therefore precluded by force of the Supremacy Clause." *Id.* at 205.

The Indian treaty canons have long been used to determine the scope of Indian treaty rights, including "in tax cases." *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912) (citing early cases). Thus,

> [w]hile in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government. Such provisions are to be liberally construed. . . . "If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." . . . And they must be construed not according to their technical meaning but in the "sense in which they would naturally be understood by the Indians."

Carpenter, 280 U.S. at 366-67 (citations omitted).

This Court's modern cases have adhered to this analytical approach, including in cases where a state sought to tax or regulate activity occurring off the reservation. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 466 (1995) (treaty

does not insulate members who live outside of Indian country from state income tax because even with liberal construction it "applies only to persons and property 'within [the Nation's] limits'"); *McClanahan*, 411 U.S. at 174-75 (treaty liberally construed in accordance with Indian treaty canons precludes application of state income tax); *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942) (terms of the 1855 Treaty with the Yakama Nation, construed "in accordance with the meaning they were understood to have by the tribal representatives at the council," preclude application of "revenue producing" fish licensing fee to Indians who fished off the reservation).

Chickasaw Nation and *Mescalero*, on which the Department relies (Br. 22), do not support a different approach. *Chickasaw Nation* dealt not with the preemptive scope of an *Indian treaty*, but with the entirely different question whether one federal statute (the Indian Gaming Regulatory Act) exempts tribes from paying gambling-related taxes imposed by another federal statute (the Internal Revenue Code). *Mescalero* concerned the breadth of tax immunity under the Indian Reorganization Act. The answer to such a *statutory* question turns on congressional intent and related canons of statutory interpretation. See *Chickasaw Nation*, 534 U.S. at 94; *Mescalero*, 411 U.S. at 155-58. That is not the case where the relevant federal law is a treaty.

There are, of course, many canons that "help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation*, 534 U.S. at 94. With respect to such canons of statutory interpretation, this Court has recognized that "other circumstances evidencing congressional intent can overcome their force." *Id.*

That does not remotely support the Department's proposal that the Indian *treaty* canons, designed to discern and protect the Indians' benefit of the bargain in a treaty, must give way when state taxes are concerned. Indeed, *Chickasaw Nation* specifically distinguished the analysis of a federal statute from the analysis where "an Indian treaty is at issue." *Id.* at 95. And the analysis must be different when an Indian treaty is at issue, because application of the "clear statement" canon that the Department proposes could result in the very thing the Indian treaty canons were intended to avoid: an interpretation that benefits the United States and does not reflect what the Indians would have understood the agreement to provide.

C. The Washington Supreme Court Correctly Applied The Treaty-Interpretation Canons

The Washington Supreme Court thus correctly recognized that to decide whether the "right to travel provision" in the 1855 Treaty "precludes the State from demanding unpaid taxes, penalties, and licensing fees for hauling the fuel across state lines," it must interpret the text following the "rule of treaty interpretation" established by this Court. Pet. App. 5a. This Court's Indian treaty cases foreclose the Department's assertion that, because the right to travel provision does not mention "taxes," the Treaty cannot preempt the State's fuel tax. Br. 24.

For example, in *McClanahan* v. *Arizona State Tax Commission*, this Court held that an 1868 treaty between the United States and the Navajo Nation precluded Arizona from applying its income tax to reservation Indians whose income derived wholly from reservation sources even though the "treaty nowhere explicitly states that the Navajos were to be free from

state law or exempt from state taxes." 411 U.S. at 174. Considering the "circumstances under which the agreement was reached" and the rule that "'[d]oubtful expressions are to be resolved in favor'" of the Indians, the Court found "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos" and to preclude extension of state tax law to Indians on the reservation. *Id.* at 174-75 (quoting *Carpenter*, 280 U.S. at 367).

Similarly, in *Tulee* v. *Washington*, this Court held that a different provision of the same 1855 Treaty at issue in this case precluded the State from charging the Yakamas a licensing "fee for fishing" even though the Treaty did not specifically mention fees or taxes. 315 U.S. at 685. *Tulee* involved the scope of the "right of taking fish" provision of Article III, which states in relevant part:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory ... .

Id. at 683. To determine the scope of that language, this Court considered a report of "the proceedings in the long council at which the treaty agreement was reached," which showed the Yakama Indians' "strong desire" to "retain the right to hunt and fish in accordance with the immemorial customs of their tribes." *Id.* at 684. Noting its "responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were under-

stood to have by the tribal representatives at the council," *id.*, the Court held that "exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty." *Id.* at 685.

Notably, the Court reached that result even though the licensing fee at issue in *Tulee* was generally applicable to all who fished in the State, and even though the treaty said the right to take fish was "in common with citizens of the Territory." The Court noted that it had held in *United States* v. *Winans*, 198 U.S. 371, that, "despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakamas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U.S. at 684. And even though the licensing fee was generally applicable, "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id.* at 685. The phrase "in common with citizens" thus was not read to limit the Tribe's right to take fish to the rights held by any citizen, but to protect the Tribe's right from infringement as it was at the time of the Treaty.

The Washington Supreme Court cited *Tulee* and similarly looked at both the text of the Treaty and the history of the treaty negotiations to determine how the Yakama Indians understood the scope of the provision guaranteeing the right to travel. Pet. App. 5a-8a. And as discussed above, the court examined the way this provision had been interpreted by federal courts, with particular attention to the district court's findings in *Flores*, following a trial and affirmed on appeal, that the Treaty prohibited the State from imposing permit fees on Yakama trucks carrying lum-

ber from the reservation to mills off the reservation. See *supra* at 3-5,

The court explained that "the Yakamas' right to travel off reservation had been repeatedly broached" during the treaty negotiations, and agents of the United States "repeatedly emphasized" that "tribal members would retain 'the same liberties ... *to go on the roads to market.*" Pet. App. 7a-8a (quoting *Flores*, 955 F. Supp. at 1244). In addition,

> The treaty was presented as a means to preserve Yakama customs and protect against further encroachment by white settlers. There was no mention of any sort of restriction on hunting, fishing, or travel other than the condition that the government be permitted to construct wagon roads and a railroad through the reservation. Finally, ... "the Treaty was clearly intended to reserve the Yakamas' right to travel on the public highways to engage in *future* trading endeavors."

Pet. App. 8a (quoting *Flores*, 955 F. Supp. at 1243). "In reliance on these vital promises," and "in exchange for these rights," the "Yakamas forever ceded 90 percent of their land." Pet. App. 8a.

The court quite reasonably concluded that the history, as "determined by the federal courts," confirms the most natural reading of the text – that "any trade, traveling, and importation that requires the use of public roads fall within the scope of the right to travel provision of the treaty." Pet. App. 16a. And the Department violates that right by "tax[ing] the importation of fuel, which is the transportation of fuel" to the Yakama Reservation. *Id.*

CONCLUSION

For the foregoing reasons, *amicus* NCAI respectfully requests that this Court affirm the judgment of the Washington Supreme Court.

Respectfully submitted,

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In The Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC., A YAKAMA
NATION CORPORATION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICI CURIAE* NEZ PERCE TRIBE AND CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTERESTS OF THE *AMICI CURIAE*[1]

The Nez Perce Tribe and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT),[2] prior to and at the time of their 1855 Treaties with the United States, had extensive networks of trade and travel routes throughout a broad geographic area including the Pacific and Inland Northwest. These trade and travel networks continue to be important to these tribes to this day.

These two tribes, in their distinct treaties with the United States, reserved—and the United States expressly "secured" to them—"free access" from their Reservations "to the nearest public highway" and "also the right, in common with the citizens of the United States to travel upon all public highways." 12 Stat. 957, 958 (June 11, 1855) (Nez Perce); 12 Stat. 975, 976 (July 16, 1855) (CSKT).

The Nez Perce Tribe and CSKT are the only other Indian tribes with an expressly reserved treaty right to travel similar to the Yakama treaty right at issue in this case. They write here as *amici* to emphasize the historical and present-day significance of the reserved

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* submitting this brief and their counsel represent that no party to this case nor their counsel authorized this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief. Both parties have consented to the filing of this brief.

[2] The CSKT consists of three tribal nations. The Selis (Bitterroot Salish, sometimes referred to as the "Flathead"), the Qlispe (Upper Pend d'Oreille) and Ksanka (Kootenai).

right to travel. They also write to address misconceptions and flawed assumptions about the treaty right to travel that have been introduced by Petitioner and its supporters.

SUMMARY OF ARGUMENT

The question in this case is whether the Yakama Treaty of 1855 preempts the application of a Washington state fuel tax on fuel imported by a Yakama corporation onto the Yakama Reservation from out of state over a public highway. Indian treaties are the supreme law of the land and preempt state laws that would constrain or abrogate treaty rights; thus the answer to that question depends on the nature and scope of the Treaty's express protection of the right to travel.

This Court's bedrock principles, that Indian treaties must be construed as the Treaty Indians would have understood them under the circumstances, including promises made during treaty negotiations by agents of the United States, were applied correctly by the Washington Supreme Court in its decision below. It relied on the history and context of the Treaty's right to travel provision, which was the subject of fact-intensive findings reached after reviewing hundreds of exhibits and weighing competing Washington and Yakama expert testimony, in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (*Yakama Indian Nation*), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1988) (*Cree II*). This approach was

consistent with federal court decisions that have relied on the historical record to discern and employ the treaty understanding of the Treaty Indians.

The history of Nez Perce and CSKT travel and trade, which were inextricably linked, the context of their treaty negotiations, and the terms of their treaties—the only other treaties with an expressly reserved right to travel similar to the Yakama treaty right at issue—closely track and support the findings made in *Yakama Indian Nation* and affirmed in *Cree II*. And almost immediately post-treaty, hostilities between settlers and local tribes resulted in blocking the road to The Dalles, which the Nez Perce used routinely for trade and travel. Appealing to the Nez Perce Tribe's protection of the right to travel all such roads, Governor Stevens asked for Nez Perce assistance in dealing with the hostilities. Careful examination of the similarly-situated historical context and evidence of understanding of the Treaty Nez Perce and CSKT as to their reserved rights to travel, strongly supports Respondent's position before this Court. And it simultaneously provides contrast to the arguments of Petitioner and its supporters, which can be seen as efforts to construe the treaty right to travel without any examination of the understanding of the Treaty Indians.

The Nez Perce Tribe and CSKT also write to address misconceptions and flawed assumptions introduced by Petitioner and its supporters. Contrary to its arguments, Washington's concerns over lagging fuel tax revenues and increasing transportation infrastructure expenses are not a legal basis for abrogating a

judicially affirmed treaty right. The Nez Perce Tribe and CSKT, and their members, are not involved in any current dispute with Idaho or Montana concerning the treaty right to travel. Idaho and Montana have chosen to enter into fuel tax agreements with the Nez Perce Tribe and CSKT respectively.

As tribes with similar historical records and similar reserved treaty rights, the Nez Perce Tribe and CSKT urge this Court in the case before it to ensure that the Treaty's express protection of the right to travel is given an interpretation consistent with the understanding of the Treaty Indians, as the Washington Supreme Court did below.[3]

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[3] The Tribes note that the primary focus of the United States' *Amicus* brief is that the particular state tax in this case should be characterized as a 'tax on the possession of goods'—an interpretation of state law rejected by that state's supreme court, and addressed in Respondent's Br. at 42-47—that does not implicate the treaty right to travel. U.S. *Amicus* Br. at 18-21. The existence of the United States' similar treaties with the Nez Perce and CSKT counsel caution by this Court with respect to broader issues of treaty interpretation, especially where these tribes are not parties to this case.

ARGUMENT

I. THE TREATY'S EXPRESS PROTECTION OF THE RIGHT TO TRAVEL WAS HISTORICALLY SIGNIFICANT AND MEANINGFUL, AND REMAINS SO.

A. The context, history, and practical construction of the Nez Perce Tribe and Confederated Salish and Kootenai Tribes (CSKT) right to travel treaty provision supports the understanding of the Treaty Indians made in *Yakama Indian Nation*.

The federal courts, in *Yakama Indian Nation* and affirmed in *Cree II*, conducted an extensive factual investigation into the historical context and the understanding of the Indians with respect to the Treaty-reserved right to travel, to determine the nature of this right, naturally focusing in that case on the Yakama. These courts examined the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed. *Id.* The trial court carefully inquired into the intentions of the parties at the time of the Treaty, and considered extensive testimony from three experts (Bill Yallup, Sr., a tribal elder, and Deward Walker, ethnohistorian and archaeologist, on behalf of Yakama; and historian Kent Richards on behalf of Washington) and hundreds of exhibits, and made detailed factual findings and conclusions of law. *Cree II*, 157 F.3d at 774. Washington thoroughly and aggressively litigated the factual and legal issues surrounding interpretation of the Treaty both in the district court and the court of

appeals, and did not seek review by this Court. Naturally, each subsequent case, including this one, has relied upon an application of *Yakama Indian Nation*'s factual findings and conclusions of law concerning the treaty right to travel, to a particular regulation at issue.

The Nez Perce Tribe and CSKT—the other two tribes with a similar treaty-protected right to travel—were not parties to that litigation. An examination of the importance of travel and trade to the Nez Perce and CSKT, the context of their treaties, the history of their treaty negotiations, and the practical construction of their treaties would support the Treaty Indians' understanding of the right to travel set forth in *Yakama Indian Nation* and *Cree II*.

1. The importance of travel and trade to the Nez Perce and CSKT.

The aboriginal territory of the Nez Perce Tribe encompassed more than 13 million acres of present-day north-central Idaho, northeast Oregon, and southwest Washington. The Nez Perce traveled widely beyond that area, including buffalo country to the east and Celilo Falls on the Columbia River to the west. The aboriginal territory of the CSKT covered all of present-day western Montana, and extended into parts of what would become Idaho, Wyoming, and the Canadian province of British Columbia. Members of the Nez Perce Tribe and CSKT traveled that vast landscape and beyond since time immemorial, hunting, fishing,

engaging in cultural activities, and exchanging goods with neighboring tribes through an extensive network of trade routes.

The Nez Perce and CSKT were part of the Plateau culture area, those tribes located on the west side of the Continental Divide of the Rocky Mountains, with aboriginal homelands ranging from the Great Plains to the Columbia River country. Smithsonian Institution 12 HANDBOOK OF NORTH AMERICAN INDIANS, PLATEAU, Deward Walker, Vol. Ed. (1998) (HANDBOOK). Salish, Kootenai, Pend d'Oreille, and Nez Perce people traveled and traded throughout the territory as integral parts of what ethnohistorians and anthropologists have termed the "Columbia River Trade Network." *Id.* at 642-52, 642 (including detailed map of trade network).

The northern crossroads of that network, connecting the Plains to the east with the Columbia River to the west, intersect the heart of CSKT territory. John Upton Terrell, TRADERS OF THE WESTERN MORNING-ABORIGINAL COMMERCE IN PRECOLUMBIAN NORTH AMERICA, 105 (1967).

While the Blackfeet posed a constant danger to tribal members who ventured east across the mountains to hunt and trade, the CSKT continued to travel the ancient routes. The Nez Perce had an expansive trading range as well, from buffalo country to the east, to fishing at Celilo Falls, to appearing with regularity at trading hubs with Coastal tribes at The Dalles of the

Columbia River, to trading with Plains tribes at the Shoshone Rendezvous. HANDBOOK, at 645.

"Early Europeans saw the Columbia Plateau as a walled fortress, isolated and virtually impossible to penetrate through the Rocky Mountain and Cascade ranges that formed its outer defenses." Laura Peers, *Trade and Change on the Columbia Plateau 1750-1840*, 10 COLUMBIA MAGAZINE (1996-1997), at http://www.washingtonhistory.org/files/library/trade-change.pdf (last visited September 20, 2018). However, to the tribes of the region, "the Plateau was the center of the world, linked to the four corners of the continent by well-worn paths and a dense social and economic network." *Id.* As Americans pushed westward into the continent, the earliest explorers experienced the vast trade network developed by the Plateau tribes. Stopping at The Dalles on their journey down the Columbia, Lewis and Clark observed the tribes that traveled there, bringing with them

> [S]kins, mats, silk grass, and bread made from couse root, which they exchanged for wapato, horses, beads, and items from the coastal traders, now retraded. Those from the foothills of the Rockies, such as the Nez Perces, brought beargrass, horses, camas root, as well as buffalo robes and other skins that they had secured, either through their own hunting or in trade with the Flathead. These they exchanged for wapato, salmon pemmican, and trade beads.

HANDBOOK, at 641 (citations omitted).

Following Lewis and Clark's journey, tribes were introduced to the idea of direct trade with the white traders at outposts erected for that purpose. *Id.* at 650-52. The tribes of the Plateau, including the Nez Perce and CSKT, adapted to the changing circumstances. *Id.* "For centuries, Indian tribes have engaged in economic and business activities, developing comprehensive trade associations and transportation routes and offering a variety of products to neighboring Indian tribes and later to non-Indians. Indian tribes carry on these traditions today, although in a different context." TRIBAL NATIONS IN MONTANA: A HANDBOOK FOR LEGISLATORS 38 (2016).

Accordingly, when the Nez Perce and CSKT met in council with the United States to negotiate treaties, maintaining and reserving their right to trade and travel was of the utmost importance. This was well understood by negotiators on both sides.

The concept of travel and trade was well ingrained into the culture and lifeways of the Nez Perce and CSKT (as with Yakama) and was something these tribes expressly retained as a right under their respective treaties with the United States. Grounded in the culture and economy of the tribes, this reserved right remains fundamental to this day.

2. Prior to the Treaty, the United States and Stevens had a long relationship with the Nez Perce and CSKT Indians.

In examining the understanding of the Treaty Indians to the Yakama Treaty, the federal court in *Yakama Indian Nation* thoroughly examined pre-treaty contacts between the United States, Stevens and the Yakama. *Id.* at 1240-42. A similar history between the United States and the Nez Perce and CSKT leading up to similar treaty provisions for these tribes supports the understanding of the Indians set forth by the federal court.

The Nez Perce Tribe and CSKT, like Yakama, had a history with the United States that long preceded the Treaty Council. The Nez Perce had, for example, rescued the Lewis and Clark expedition after it crossed the Bitterroot Mountains.

Stevens, as *Yakama Indian Nation* noted, was Chief Engineer of the Northern Division of the Pacific Railroad Surveys chartered by Congress to ascertain the most expedient transcontinental railroad route, in addition to serving as the Territorial Governor of the Washington Territory, and Superintendent of Indian Affairs for Washington Territory.

Stevens, in all of his roles, was entering a world in which the Nez Perce and CSKT, like the Yakama, already had well-established travel and trade networks, as contemporaneous accounts document, and were well connected with the Yakamas. Securing travel, trade, and transportation routes were fundamental motivations for all parties to these treaties.

Stevens' northern railroad survey party included several groups. Stevens' group, the largest, surveyed west from St. Paul, Minnesota, across the northern plains and mountains to the Washington Territory. Alvin M. Josephy, Jr., THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST 1965, 1997 edition (Complete and Unabridged), at 293 (NEZ PERCE INDIANS). Stevens had reached Fort Benton in northern Montana on September 1, 1853, and faced the problem, from the perspective of a railroad route, of the prospect of Indian wars on the northern plains. *Id.* at 300-01. He proposed to the Blackfeet that they meet with him in council the following spring to make a lasting peace with the Americans and with the CSKT, Nez Perce, and other tribes that came from the west to hunt buffalo. He then faced the obstacle of finding a route west; he was told of the easy pass to the Bitterroot Valley: "the old buffalo road via Hellgate that the Flatheads and Nez Perces often took to the plains." *Id.* at 301.

Existing Nez Perce and CSKT trade routes proved to be vitally important to and interconnected with both the railway surveys and the treaties. For example, Stevens' railroad report describes how "both routes travelled are perfectly practicable for wagons," how the two trails through the Coeur d'Alene mountains are known as "the northern and southern Nez Perces trails" and how the Walla Walla area "has already attracted the attention of emigrants, and if the Indian title were ever extinguished, it would be rapidly filled up." U.S. War Department, EXPLORATIONS AND SURVEYS FOR A RAILROAD FROM THE MISSISSIPPI RIVER TO THE PACIFIC

OCEAN: REPORT OF EXPLORATIONS FOR A ROUTE FOR THE PACIFIC RAILROAD NEAR THE FORTY-SEVENTH PARALLELS OF NORTH LATITUDE, FROM ST. PAUL TO PUGET SOUND BY I.I. STEVENS (University of Michigan Reprint Series, 2005) (1855) (STEVENS' RAILROAD REPORT) 105, 108. Stevens often directed his survey team to use Nez Perce trails, such as the most southernly Nez Perce trail over the Bitterroots to the Clearwater River and Fort Walla Walla, with the accompaniment of Salish guides. NEZ PERCE INDIANS, at 303. Stevens, meeting large bands of Nez Perce bound for buffalo country, informed them of the promise to hold a council the next spring to make peace with all tribes. Upon reaching Coeur d'Alene, a Nez Perce Indian arrived from Fort Walla Walla with news that the first group of emigrants from the States, under the leadership of a man named James Longmire, had travelled successfully from Walla Walla to Puget Sound the month before over the new Naches Pass Road. NEZ PERCE INDIANS, at 303.

These routes, well known to the Indians and early traders, informed Stevens' railroad and treaty projects.

> Stevens had confirmed the practicability of a northern railroad, but the explorations of the members of his party had, in addition, provided the expedition with considerable information about the geography of the Sahaptin and Salish lands and the best and fastest routes of travel through them. Most of this great interior country had already been well known to the British traders; but at Olympia, Stevens and his men prepared detailed and accurate maps and compiled minute traveling

> memoranda that revealed the secrets of the region for the first time to the American settlers who had bypassed the area on their way to the coast. This information was to be useful during the next few years.

NEZ PERCE INDIANS, at 307.

In the meantime, another survey party, under Captain McClellan, started from Fort Vancouver, and as set forth in *Yakama Indian Nation*, the Yakamas were skeptical of him. As Josephy also explains,

> [The Yakama] knew that white men from the settlements at Puget Sound were already familiar with the Naches Pass and were even then building a wagon road over it. The highway would come out at the Yakima River and run all the way through the Yakimas' lands to Fort Walla Walla where it would connect with the Oregon Trail and give emigrants an opportunity to go to Puget Sound rather than to the Willamette.

NEZ PERCE INDIANS, at 298-99.

Lieutenant Mullan, as part of Stevens' railroad survey, had covered "a huge expanse of territory, although most of it was already thoroughly familiar to the trappers and traders." NEZ PERCE INDIANS, at 309. George Gibbs, a lawyer, ethnologist, and advisor to Stevens and also part of that survey team, reported, the tribes "*require the liberty of motion* for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large." STEVENS' RAILROAD REPORT at 423

(emphasis added). The historical record is clear that prior to the treaty negotiations, both Stevens and the Nez Perce and CSKT, like Yakama, were familiar with the important role of travel and trade routes.

3. The importance of the Treaty right to travel.

a. The Walla Walla Treaty Council, Treaty with the Nez Perces.

The Walla Walla Treaty Council negotiations were carefully examined in *Yakama Indian Nation* and affirmed in *Cree II*, naturally focusing on the Yakamas.

The history and context of the Nez Perce and CSKT treaty negotiations confirm the significance of the treaty-reserved rights to travel to these tribes whose culture and way of life was crucially connected to travel and trade, from buffalo country to The Dalles and the Columbia.

The Nez Perce and Yakama treaties were negotiated at what is commonly referred to as the Walla Walla Treaty Council. As Stevens and the white men spoke, interpreters translated English sentences to Indian criers who announced it in loud voices to the assemblage. The Nez Perce kept their own record of the Council, as depicted in the eyewitness drawings made

by Gustavus Sohon[4] at the Treaty Council, though that record has not been located.

Courtesy Smithsonian Institution.

Treaty Minutes, prepared by the United States, provide a record of Stevens' statements and assurances to the Indians assembled at the Walla Walla Treaty Council.[5]

The Nez Perce were prominent throughout the proceedings at the Walla Walla Treaty Council, which

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[4] Jack Nisbet, *Sohon, Gustavus (1825-1903)*, HistoryLink.org, at http://www.historylink.org/File/8593 (last visited September 20, 2018); see John C. Ewars, GUSTAVUS SOHON'S PORTRAIT OF FLATHEAD AND PEND D'OREILLE INDIANS (1948).

[5] The *Official Proceedings of the Council in the Walla Walla Valley* (Treaty Minutes) were examined by the *Yakama Indian Nation* court.

some members of the CSKT attended. The Nez Perce arrived at the Treaty Council with "considerable ceremony," first planting a United States flag that had been presented to them by officers in the Cayuse War in the valley near the treaty ground. James Doty, JOURNAL OF OPERATIONS OF GOVERNOR ISAAC INGALLS STEVENS OF WASHINGTON TERRITORY (JOURNAL OF OPERATIONS), May 24, 1855.[6] They arrived "all mounted on fine horses" in a show of strength, with at least 29 chiefs and headmen riding in first, followed by some 600 warriors riding two abreast who passed through the camp, then returned to the banner of the United States flag. *Id.*

Courtesy Smithsonian Institution.

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[6] James Doty, Secretary to Stevens, accompanied Stevens on the railroad surveys and assisted Stevens with prior treaty negotiations.

Prior to the opening of the Council, Stevens and James Doty visited Lawyer, a Nez Perce leader, at his lodge at the treaty grounds. *Id.* May 28, 1855. Lawyer explained a map of Nez Perce country he had drawn for Stevens, and Stevens expressed appreciation for Nez Perce friendship since the time of Lewis and Clark. *Id.*

Stevens broached the right to travel early in the Council. On May 31, 1855, Stevens told the Indians present:

> We do not want you to agree not to get roots and berries, and not to go off to the Buffalo: we want you to have your roots and get your berries, and to kill your game; we want you if you wish to mount your horses and go to the Buffalo plains, and we want more; we want you to have peace there.

Treaty Minutes.

Stevens explained further on June 5, 1855:

> You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, *to take your things to market*, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation.

Id. (emphasis added).

> Stevens' knowledge of the importance of the travel and trade routes and resources crucial to the tribe, as well as the relationships between the tribes, is evident when Nez Perce leader Looking Glass arrives at the Treaty Council. Stevens acknowledged that Looking Glass was close by and that "he has come way from the Blackfeet—the buffalo country across the mountain" and then describes his plan that "two or three of us will go and take him by the hand and set him down by his chief in the presence of his friend Kamiakun [of the Yakamas]."

Id. June 8, 1855.

Looking Glass, having learned of the Council in the St. Mary's valley of present-day Montana on his way home to Nez Perce country, "pushed on making the distance of 300 miles in seven days" across the Lolo trail to reach the Treaty Council. JOURNAL OF OPERATIONS, June 8, 1855. Looking Glass' arrival was another show of strength, with his party coming toward the camp "painted and armed, singing a war song, and flourishing from the top of a pole, a newly taken scalp [of a Blackfoot]." *Id.* Looking Glass, without dismounting from his horse, expressed his indignation that, "While I was gone you have sold my country." *Id.*

Stevens, as a result of Looking Glass' arrival and concern about the Treaty, "once more—for Looking Glass' benefit—explained the principal points" of the Treaty on June 9, 1855. Treaty Minutes. Stevens assured the Nez Perce leader and all assembled:

> I will ask of Looking Glass whether he has been told of our council. Looking Glass knows that in this reservation settlers cannot go, that he can graze his cattle outside of the reservation on lands not claimed by settlers, that he can catch fish at any of the fishing stations, that he can kill game and go to Buffalo when he pleases, that he can get roots and berries on any of the lands not occupied by settlers. He knows what the Reservation is . . . and all the other things that have been spoken of: the people all know it, it has been read over two or three times.

Id.

When the Council adjourned that Saturday, no agreement had been reached. *Id.* When the Council opened on Monday, June 11, 1855, "[n]o mention was made of the important fact" that after the Council had adjourned on Saturday, Kamiakun and other Yakamas had signed the Yakama Treaty. JOURNAL OF OPERATIONS, June 11, 1855. The Treaty Minutes document that at some point on June 11, 1855, Lawyer, Looking Glass, and other Nez Perce signed the Treaty; the Treaty Minutes do not reveal the deliberations or pressures that resulted in Nez Perce agreement. After the Nez Perce signed the Treaty, Looking Glass and other Nez Perce accompanied Stevens to the subsequent Treaty Council with the CSKT as well as the "common buffalo treaty" council with the Blackfeet at Fort Benton.

On June 23, 1855, an article signed by Stevens appeared in the *Oregon Weekly Times* announcing,

prematurely, that all areas outside the reservations were open to settlement. NEZ PERCE INDIANS, at 337-38. This is widely acknowledged as leading to the hostilities that broke out in the coming months, including those that blocked the road to The Dalles—an event that, as described below, led Stevens to emphasize the Nez Perce treaty right to travel.

b. The Hellgate Treaty Council, Treaty with the CSKT.

After leaving the Walla Walla valley, Governor Stevens traveled through Nez Perce country, collecting a delegation of Nez Perce to attend the Blackfoot Council, then passed over the "southern Nez Perce Trail" to hold a council with the CSKT. JOURNAL OF OPERATIONS, July 7, 1855.

Courtesy Smithsonian Institution.

On Saturday, July 7, 1855, Stevens selected a location for the Treaty Council at Council Grove, where the Bitterroot River flows into the Clark Fork River (what Stevens referred to as "Hellgate") near present-day Missoula, Montana. The Indian people at the Council expected to discuss the establishment of peace between the Salish and Kootenai and their encroaching enemies, the Blackfeet, not land cessions. BIGART AND WOODCOCK, IN THE NAME OF THE SALISH AND KOOTENAI NATION—THE HELLGATE TREATY AND THE ORIGIN OF THE FLATHEAD INDIAN RESERVATION 1 (1996). Prior to the formal Council, prominent Salish, Kootenai, and Pend d'Oreille leaders met with Stevens, who said to them:

> You have heard I suppose of the Council at Walla Walla and what was there said to the Indians. The treaties made there were fully explained. We made treaties with the Nez Perces and others, numbering in all some 6000 Indians, and placed them on reservations. I wish to make with you treaties similar to those made at that place, and on Monday I will speak to you about it and explain all things fully; but in the meantime the Flatheads and Nez Perces who came up with us were present at that council and can tell you all about it.

Official Proceedings of the Council in the Bitter Root Valley, in Albert J. Partoll, The Flathead Indian Treaty Council of 1855, 29 PACIFIC NORTHWEST QUARTERLY 283 (July 1938) (Hell Gate Treaty Minutes).

In opening the formal Treaty Council on July 9, 1855, Stevens emphasized that several CSKT members had been present at the Walla Walla Treaty Council and his intent "to make with you a treaty similar to the treaty I made with the Nez Perces." Hellgate Treaty Minutes, at 287.

Governor Stevens, seeking to conclude the Treaty Council four days later and facing tribal leaders reluctant to sign the document, explained the provisions of the treaty as including a reservation of land as their exclusive homeland, along with the right to carry on their traditional way of life throughout their aboriginal lands:

> You have the right however to pasture your animals at other places if those places are not occupied by the whites. You have in like manner the right to gather roots and berries, to take fish and kill game. *You have also the right to go on to the roads of the whites and take your produce to market.* The Great Father has the right to make roads through your country if necessary.

Hellgate Treaty Minutes, at 302 (emphasis added).

The treaty was signed on July 16, 1855. In this treaty, "[t]he Indians ceded some 25,000 square miles, including the Hellgate-Missoula region and the Clark Fork Valley trade route, both of which Stevens wanted for the railroad." NEZ PERCE INDIANS, 340.

4. Almost immediately post-treaty, Governor Stevens invoked the treaty right to travel in response to hostilities blocking the road to The Dalles the Nez Perce used to get winter supplies.

After concluding a treaty with the Blackfeet ensuring the use of a Common Buffalo Ground for tribes including the Nez Perce and CSKT, Stevens headed west to meet with the Spokanes and Coeur d'Alenes. On October 29, 1855, while on the Teton River on the eastern side of the Continental Divide, Stevens learned from his express rider, W.H. Pearson, that war had "exploded on both sides of the Cascades":

> The Indians of Puget Sound had attacked the settlements in that district, and along the Columbia River from the Cascades to the Colville Valley tribes had gone on the warpath. The Cayuses, Wallawallas, Umatillas, Palouses, and Yakimas were fighting . . . Indian agent A. J. Bolon had been murdered and an expedition of federal troops under Major Haller had been defeated and forced to retreat from the Yakima country . . . The Spokans and Coeur d'Alenes were about to join the hostiles, and even many of the Nez Perces were threatening to enter the war.
>
> Stevens and his party, said Pearson, were cut off. A large Indian army lay in wait in the Walla Walla Valley to wipe them out. Pearson himself had been chased by warriors from the Umatilla to the Nez Perce country, where Red

> Wolf and other friendly Indians had taken care of him. Then a Nez Perce had guided him hurriedly across the Lolo Trail to bring the news to Stevens.

NEZ PERCE INDIANS, at 343-44.

Stevens, traveling the Nez Perce Lolo Trail, overtook Looking Glass and the delegation of Nez Perce chiefs returning to their homes, who had already heard of the outbreak of hostilities and agreed to accompany Stevens across the mountains. *Id.* Stevens met with the Coeur d'Alenes and "[a]t the same time Stevens learned of the dangers still facing him on the road ahead." *Id.* at 349. The tribes father south had gathered to block his route, and Peopeo Moxmox [Walla Walla] "was said to have boasted that he would take Stevens' scalp himself." *Id.* Stevens dispatched most of the Nez Perce delegation to Lapwai to determine whether he could count on Nez Perce assistance, and then set out for Spokane country. Accompanied by three Nez Perce leaders, including Looking Glass, Stevens met with the Spokanes, Couer d'Alenes, and Colvilles, some of whom accused Stevens of being responsible for the war.

Stevens departed for Nez Perce country on December 6, 1855, and was met the next day by a messenger with the news that the Nez Perce had not joined the war and would help Stevens. JOURNAL OF OPERATIONS. On December 11, 1855, Stevens and his party "[p]ushed on as rapidly as the state of the roads, very heavy and slippery from the rain and melting snow,

would permit," reaching the Lapwai area, camping in an area with "208 Nez Perce Lodges, containing not less than 2000 men, wom[e]n and children, and able to muster 800 warriors." *Id.*

On December 12, 1855, Governor Stevens met with several principal chiefs of the Nez Perce, and recounted how he learned of the war as he was leaving Fort Benton, and had since received information that the Walla Wallas had entered the war and that it was feared the Cayuses would as well. Stevens stated, "I think that all the Nez Perces who have arms had better go with me, and then we can see how it is." JOURNAL OF OPERATIONS. Lawyer responded that before proceeding, "We want to talk and find out our hearts just as they are." Looking Glass made a similar point, responding that,

> It is better to find out all our hearts before you start. There are people in the way blocking up your road. We do not know what they will do. . . . I told you long ago that the Nez Perce trail to Walla Walla was the road for you to travel on. Although they may be fighting, it is the road, there is no other.

Id.

Governor Stevens assured the Nez Perce that "[i]f we find them [the other Indians] friendly we shall not fight them, but if we find them with arms in their hands, we shall." *Id.* Governor Stevens then invoked the treaty right to travel agreed to at the Walla Walla Council:

> The Cayuses, and Walla Wallas know that the Nez Perce are friendly to the Whites. What will they do to a Nez Perce who goes to the Dalles to get his winter supplies? Did not the Cayuses and Umatillas and Walla Wallas agree in the Treaty that the Nez Perces might travel in peace on all the roads through their country, the road to the Dalles?
>
> We agreed in the Treaty every Indian should have a right to travel on the road, yet now the hostile Indians are blocking it up.

Id.

The following day, December 13, 1855, Stevens met in a formal council with some 200 Nez Perce, including all the principal chiefs, with Lawyer presiding. Stevens acknowledged his appreciation for Nez Perce assurances that they were not joining the warring tribes: "My heart is glad to see you and hear you speak as you have done." *Id.* Stevens stated, "We parted [the Walla Walla Treaty Council] as friends—did they [the Indians who are fighting] really believe I was their enemy, and would they not trust to the agreements made with them?" *Id.*

Governor Stevens then, again, invoked the treaty right to travel to address the road to The Dalles that had been blocked up:

> Tomorrow I wish to start for the Walla Walla Valley. I want the Nez Perces, who have horses and guns to go with me.

> Recollect my friends, in the Treaty of Walla Walla, you had the right guaranteed to you, to travel on all the roads to the Dalles, all the roads through the Lower Country. Yet those roads have been blocked up against you, as well as against the Whites. Get ready therefore, we will start tomorrow if we can, and open the road. There will be payment made you for this service, when the President can be written to, and we receive his answer. You will be paid like the White Volunteers.

Id.

The Nez Perce chiefs "expressed their hearty concurrence in the sentiments expressed by the Governor, and said their Warriors should be ready if possible tomorrow." *Id.*

The following evening, December 14, 1855, after Stevens' men began moving out and the Nez Perce prepared to accompany Stevens, a messenger arrived with news that a large army of volunteers had defeated the hostile Indians in a four-day battle in the Walla Walla valley and scattered the Indians. Sixty-nine Nez Perces accompanied Stevens as an honor guard to Walla Walla. NEZ PERCE INDIANS, at 356. No trouble was encountered, and upon reaching Walla Walla, Stevens deemed his own party sufficient in numbers to march to The Dalles, and sent the Nez Perce auxiliaries back to their home country, issuing orders providing that Nez Perce volunteers be mustered out of the service with compensation. JOURNAL OF OPERATIONS, December 29 and 31, 1855.

5. Nez Perce and CSKT travel and trade continue to be significant following the Treaty.

Travel and trade continued to be significant to the Nez Perce and CSKT following the treaties. Stevens, for his part, became an advocate for the treaties in his speeches before Congress. *E.g.*, House Delegate Isaac Stevens to J.W. Nesmith, Supt. Ind. Affairs, January 18, 1858 (Stevens Papers, University of Washington Library, Reel 3). And, for example, the Commissioner of Indian Affairs' Report to Congress in 1860 noted, "[t]hese Indians *have large bands of horses, which they sell to the traders, or drive to Walla-Walla and the Dalles, and exchange for blankets, clothing, and groceries.*" Report of the Commissioner of Indian Affairs, 1860, H. Ex. Doc. 1, Vol. 1 (1861) (emphasis added).

The Nez Perce Tribe and CSKT, and their members, view their treaty as "sacred" and "sacrosanct" documents whose importance "cannot be overstated," similar to testimony offered by the Yakama in *Yakama Indian Nation*, 955 F. Supp. at 1237-38 (describing testimony of Yakama elders and experts). The current Chairman of the Nez Perce Tribe, Shannon Wheeler, a descendant of Kool-kool-tick-lih-kin (who was present at the Treaty Council), for example, frequently refers to the treaty right to travel as a protection of "sacred economic security" for the Nez Perce. Chairman's Report to the Nez Perce General Council, September, 2018. As such, it is not some ancient relic from the past, but rather a foundation to maintain a way of life no less important than any other provision of the Treaty.

Similarly, the CSKT view the Treaty of Hellgate as a direct connection to the tribal leaders who negotiated it with the United States, and know that those tribal leaders sought to preserve the culture and traditional life-ways of the Salish, Pend d'Oreille, and Kootenai people—including the right to travel—that would ensure the tribes' political and economic survival in a rapidly changing world.

Today, economic development for the Nez Perce and CSKT continues to rely on economic tools involving travel, trade, and commerce that led areas like Celilo Falls, for example, to be described as "[t]he Great Mart of all this Country [that the Nez Perce] visit for the purpose of tradeing horses buffalow robes for beeds, and Such articles as they have not"[7] by Lewis and Clark, and as the "Wall Street of the West" more recently.[8]

---

[7] JOURNALS OF THE LEWIS AND CLARK EXPEDITION (Gary E. Moulton, ed.), April 16, 1806, at https://lewisandclarkjournals.unl.edu/item/lc.jrn.1806-04-16#lc.jrn.1806-04-16.03 (last visited September 20, 2018).

[8] *Expressing the sense of the House of Representatives concerning the 50th anniversary of the flooding of Celilo Falls*, H.RES. 217, 110th Cong. (April 17, 2007).

B. The arguments of Petitioner and its supporters which seek to render the Treaty right to travel meaningless, are fatally flawed, and must be rejected.

1. Treaties may not be interpreted divorced from an examination of the understanding of the Treaty Indians.

This Court, in examining Article III of the Yakama Treaty over a century ago with respect to the right to "take fish at all usual and accustomed places in common with the citizens of the territory" rejected the notion that the Indians "acquired no rights but what any inhabitant of the territory or state would have"—that is acquired no rights but such as they would have had without any treaty—emphasizing that that would be "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more." *United States v. Winans*, 198 U.S. 380 (1905).

This Court again, in examining the Article III "in common with" right in the Yakama Treaty, emphasized the importance of interpreting treaties as the Treaty Indians would have understood them. *United States v. Tulee*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

In *Yakama Indian Nation*, the court emphasized, "Notably, the Treaty does not include a restriction on the Yakamas' right to travel; rather it secures a right to travel." 955 F. Supp. at 1246. "[A]s the Yakamas

understood this term, no impediment was placed on their customary practice of travel or their right to travel to market." *Id.* at 1247. The court emphasized that no evidence suggests that the term "in common with" placed Indians "in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." *Id.* Stevens "explicitly guaranteed that the Yakamas would retain the right to travel outside the reservation in pursuit of their traditional practices of fishing, hunting, and gathering, as well as taking goods to market." *Id.* In the terms of the bargain "no reference is made to other conditions such as payment for or maintenance of public roads, either on or off-reservation." *Id.* at 1247-48. "[T]he Yakamas would have naturally understood that they would be able to travel the public highways without restriction." *Id.* After emphasizing that Stevens "was well aware of the Yakamas' far-ranging patterns of travel and the importance of travel to Yakama culture" the court found that "No evidence suggests that Stevens communicated an intent to restrict the Yakamas' right to travel, such as demanding payment or fees for the construction of public roads." *Id.* Thus, the language of the Treaty, when viewed in the historical context as the Yakamas would have understood it, "unambiguously reserves to the Yakamas the right to travel the public highways without restriction for purposes of hauling goods to market." *Id.* The court noted "The record clearly demonstrates the Yakamas understood the Treaty to preserve their right to travel, much as it secured their right to fish in usual and accustomed places." *Id.* at 1249. The court of appeals

affirmed, after reviewing the Treaty Minutes and the district court's findings of fact. *Cree II*, 157 F.3d at 771.

Yakama Indian Nation and *Cree II* demonstrate that the treaty construction arguments made by Petitioner and its supporters have no merit.

First, this Court's long-standing rules for interpreting Indian treaties are, alone, enough to reject the two approaches to Treaty construction offered by the *amici* states: parsing Treaty language "according to the technical meaning of the words to learned lawyers" and construing Treaty language without any examination of the Treaty Indians. *Amici* States' Br. at 15-17. The lengths to which *amici* states must go to offer a tortured construction of the Treaty right is remarkable, and divorced from the factual examination and findings of fact and law in *Yakama Indian Nation* and *Cree II*.

Second, as this Court in *United States v. Winans* held with respect to the Treaty right of taking fish, *Yakama Indian Nation*, affirmed by *Cree II*, rejected the argument that the treaty right to travel meant nothing more than what any other citizen of the territory would possess. This argument was thoroughly made, considered, and rejected.

Third, Petitioner's efforts to suggest that the Yakama Treaty should be construed by examining some other tribe's experience in some other region of the country (the Utah Tribe) (Pet. Br. at 38 n. 18) that bears no relationship to the history of the Pacific and Inland Northwest, cannot be squared with a required

precise examination of the context and history of *these* treaties.

Fourth, *amici* states attempt to obtain purchase by arguing that the treaty language is the right to "travel" and does not use the word "trade," citing a statement by the court in *King Mountain Tobacco Co. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). This soundbite says too little and attempts to prove too much. *King Mountain* itself is clear that this reading does not—and cannot under rules for interpreting Indian treaties— end the inquiry into the meaning of the right as the Treaty Indians would have understood it. None of the cases following *Yakama Indian Nation* and *Cree II* alter the fundamental findings of fact and conclusions of law concerning the Treaty Indians' understanding of the right to travel, and *King Mountain* specifically references all of those cases—*Yakama Indian Nation*, *Cree II*, *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), *Ramsey v. United States*, 302 F.3d 1074 (9th Cir. 2002)—to distinguish the situation that was before it.

II. THE "PARADE OF HORRIBLES" ARGUMENTS ADVANCED BY PETITIONER AND ITS SUPPORTERS ARE UNFOUNDED.

A. A state's inability to impose a tax such as the one at issue does not necessarily mean that the good is untaxed or that another sovereign will not collect a tax.

Petitioner and its supporters attempt to leave the impression that if a state cannot collect a tax, this

means the tax goes uncollected. This is not the case. As sovereigns, tribes may collect a tax, and may use those revenues for purposes similar to those of other governments. The Nez Perce Tribe, for example, has chosen to collect a fuel tax from its retailers that is dedicated to transportation-related expenses including road maintenance costs. It did so before entering into a fuel tax agreement with Idaho and it continues to do so pursuant to an agreement that the Nez Perce Tribe and Idaho entered into in 2007.

B. Washington's transportation infrastructure expenses are not a sufficient legal basis for abrogating a judicially affirmed treaty right.

Petitioner's supporters argue that Cougar Den's activities "impact Washington State fuel tax revenues, diminishing funds available for necessary transportation operations and capital projects at a time when Washington transportation needs are not being met due to lagging revenues." *Amici* Washington Oil Marketers Ass'n *et al.* Br. at 18. The inability of Washington to collect a fuel tax from Cougar Den to address its transportation infrastructure needs accompanies an argument that the Washington Supreme Court's application of the treaty right to this particular state fuel tax should be overturned.

However, as the article cited by Petitioner's supporters explains,[9] Washington is currently studying other approaches to address the reality that road construction and maintenance expenses significantly outpace—by orders of magnitude—its fuel tax revenue. Washington, which does not have a state income tax, is studying options including a "pay-by-the-mile" road usage charge on miles driven on the highway. *Id.* While that particular approach, under the established case law, would be an impermissible infringement on the treaty right to travel, it serves to illustrate two points. First, state regulations can and do change, as do state and tribal relationships; the facts specific to this narrow state fuel tax dispute should not be used to abrogate the judicially affirmed treaty right to travel in resolving this case or in addressing some future regulation-specific harm that Petitioner or its supporters may envision. Second, respectfully, any ruling from this Court on the intersection of the treaty right to travel and the very specific state fuel tax at issue should not alter the Treaty Indians' understanding of the right to travel set forth in *Yakama Indian Nation* and affirmed by the Court of Appeals in *Cree II*.

---

[9] David Gutman, *Washington state to test pay-by-the-mile as a way to fund highways*, Seattle Times (September 6, 2017) (cited in Washington Oil Marketers Ass'n *et al.* Br. at 18 n. 16).

C. There are no current disputes concerning the treaty right to travel involving the Nez Perce Tribe, CSKT, Idaho, Montana, or any other state.

Currently, there are no disputes concerning the treaty right to travel involving the Nez Perce Tribe, CSKT, Idaho, Montana, or any other state. Idaho has not contacted the Nez Perce Tribe to indicate it has a concern with the treaty-reserved right to travel. Idaho did not contact the Nez Perce Tribe to discuss what it may see as the potential consequences of the Washington Supreme Court's decision. The state *amici* brief in support of Petitioner, which Idaho joined, does not identify any active concern with the Nez Perce Tribe and the treaty-reserved right to travel. And the state *amici* brief does not identify any active concern involving the CSKT.

D. Idaho and Montana have chosen to enter into fuel tax agreements with the Nez Perce Tribe and CSKT.

Many of the assumptions Petitioner and its supporters make concerning state and tribal relations and state and tribal fuel tax agreements—that serve as a launching point for their "parade of horribles" arguments—ignore the intricacies and nuances of state-tribal relationships and the agreements that have been reached.

1. Both Idaho and Montana have entered into fuel tax agreements with the Nez Perce Tribe and

CSKT, respectively. For Idaho and the Nez Perce, these agreements were preceded by contentious litigation and have now been in place for well over a decade. For Montana and CSKT, these agreements have "resolved much of the previous legal uncertainty and economic disarray caused by competing and conflicting state and tribal taxation frameworks," avoiding "costly and prolonged litigation—and the resultant problems for private business development on reservations. . . ." Governor's Counsel State-Tribal Revenue Sharing Memorandum to Montana Legislature 1 (State-Tribal Relations Interim Committee Hearing, October 21-22, 2015).[10] Montana's state-tribal tax agreements are intended to "assist in the administration of taxes and prevent the double taxation of certain economic transactions over which both the tribe and state have taxation authority." *Id.*

2. The mechanics of the fuel tax agreements that Idaho and Montana entered into with the Nez Perce Tribe and CSKT, respectively, are distinctly different from each other, and different from the approach Washington describes as in place for tribes in Washington other than Yakama. This illustrates that sovereigns may choose different approaches to finding acceptable interest-based resolutions reflecting the nuances of state-tribal relationships and the intricacies of state regulations, and that the approach Washington describes that it has entered into with other

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[10] Available at: https://leg.mt.gov/css/Committees/Interim/2015-2016/State-Tribal-Relations/Meetings/Oct-2015/oct-2016.html (last visited September 20, 2018).

tribes in Washington should not be generalized to other situations.

The CSKT-Montana Agreement is in place until 2022. The CSKT did not concede the diminution of any Treaty-reserved rights (including the Article III right to travel), but agreed that as long as the Agreement is in effect and Montana makes the required quarterly payments, the CSKT will not participate in litigation challenging state taxation of motor fuels on the Flathead Reservation.

The CSKT and Montana have committed to good faith negotiations for successive ten year terms and there is nothing to indicate that the Agreement will not be renewed. Any concerns raised by the Petitioner or its *amici* regarding what might occur in Montana should this Court affirm the Washington Supreme Court's decision below are unfounded. (See, e.g., *Amici* States' concern that affirmance "may encourage" the CSKT and Nez Perce to "adopt business models that allow them to 'market' their exemption from taxation" nationwide. Brief of *Amici* States, p. 6). The Montana-CSKT partnership has worked well. The predictable stream of revenue generated by the Agreement is used to supplement funding for programs and services needed by CSKT tribal members. The "parade of horribles" theorized by Petitioner and its supporters are not a reality in Montana.

E. Petitioner's arguments about opening a Pandora's Box with respect to the intersection of the treaty right to travel with public safety are unfounded.

1. Despite Petitioner's continued arguments before this Court, neither this case, nor the treaty right to travel, places a cloud over Washington's ability to regulate Yakama use of Washington highways with respect to licensing, weight limits or other safety rules, speed limits, felon-in-possession of firearm prohibitions, or regulations that prohibit certain fruit from being hauled from a quarantined area through a pest-free area. Pet. Br. at 44-45. Petitioner's fears concerning these types of public safety regulations were rejected by both the majority and dissenting opinions of the Washington State Supreme Court. Pet. App. at 14a-16a (majority); 27a (dissent). Similar arguments that the treaty right to travel would sanction transport of "illegal narcotics" or "forbidden fruits [and] vegetables" have previously been rejected as "unfounded if not disingenuous." *Smiskin*, 487 F.3d at 1270-71. As the Yakama Nation explained:

> The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order . . .
>
> [T]he Nation has no interest in promoting, condoning, or protecting activities by its members that pose real dangers to public health, public safety, natural resources, or public infrastructure. [T]he Yakama Nation

> and its members share the interest all citizens have in public health, public safety, conservation and equitable exploitation of natural resources, and adequate public infrastructure.

Id. at 1271.

Like Yakama, the Nez Perce Tribe and CSKT have protective governmental interests that as a practical matter nullify Petitioner's public safety fears.

2. Neither is this case about the intersection of the treaty right to travel with the intricacies of state tobacco taxes or federal tobacco taxes, which involve a distinct and different set of regulatory regimes and factual inquiries from the Washington motor fuel tax at issue and must be decided on those specific facts and regulations. The Nez Perce Tribe and CSKT have no state-tribal tobacco tax disputes and implement campaigns to prevent and address tobacco use, working in concert with federal, state, and non-governmental partners.

* * *

As tribes with similar historical records and similar reserved treaty rights, the Nez Perce Tribe and CSKT urge this Court in the case before it to ensure that the Yakama Treaty's express protection of the right to travel is interpreted consistent with the understanding of the Treaty Indians, as the Washington Supreme Court did below.

CONCLUSION

The judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,
Petitioner,

v.

COUGAR DEN, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF PUBLIC HEALTH ORGANIZATIONS AS *AMICI CURAIE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Although this case involves State taxation of motor fuel, the rationale underlying the decision of the Supreme Court of Washington potentially threatens the collection of taxes on cigarettes and other tobacco products by all States. *Amici curiae* are public health organizations that work to reduce the consumption of cigarettes and other tobacco products in the United States, and especially to reduce the use of tobacco products by children. The attached Appendix contains a brief description of each of the *amici*.

Experience has demonstrated that the imposition and collection of taxes on tobacco products is a highly effective tobacco control measure because taxes are reflected in the retail price of tobacco products and higher prices reduce and prevent consumption, especially consumption by children. *Amici* file this brief to alert the Court to the importance of the public health benefits resulting from the collection of taxes on tobacco products, benefits that could be jeopardized if this Court upholds the decision of the Washington Supreme Court.

SUMMARY OF ARGUMENT

Consistent with the basic laws of economics, when cigarettes cost more, fewer people—particularly children—purchase them. As a result, taxation of

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

cigarettes is universally recognized as one of the most effective ways to reduce smoking—particularly among youth. The State of Washington, like many jurisdictions, has imposed taxes on tobacco products. Those taxes improve public heath by reducing consumption of cigarettes. The decision of the Washington Supreme Court has the potential to undermine the interest of the States, and the actions they have taken, to protect the health of their citizens. Indeed, a tobacco company wholly owned by members of the Yakama Nation and organized thereunder is already seeking to use the decision below to support its challenge to New York State's collection of tobacco taxes.[2] The decision of the Supreme Court of Washington, if extended to taxation of cigarettes, could undermine not only the public health policy of the State of Washington but that of all other States as well.

ARGUMENT

I. THE STATE OF WASHINGTON HAS IMPLEMENTED A TAX POLICY ON CIGARETTES INTENDED TO PROTECT THE PUBLIC HEALTH.

The Surgeon General has called raising prices on cigarettes "one of the most effective tobacco control interventions."[3] Tobacco taxes reduce consumption

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[2] Br. and Special App. of Defendant-Appellant-Cross-Appellee at 51-53 & n.21, *New York v. Mountain Tobacco Co.*, No. 17-3198/17-3222 (2d Cir. Feb. 20, 2018).

[3] U.S. Dep't of Health & Human Servs., *The Health Consequences of Smoking – 50 Years of Progress: A Report of the Surgeon General* ("*2014 SG Report*") 869 (2014), https://www.surgeongeneral.gov/library/reports/50-years-of-progress/exec-summary.pdf.

because they are passed through to retail buyers and raise the price of cigarettes. Smoking by children, who have less disposable income than adults, is disproportionately affected by changes in the retail price of cigarettes. Tobacco taxes represent a larger percentage of the retail purchase price of cigarettes than do taxes on most other products and hence have a larger effect on demand. In the State of Washington, for example, in 2017 the average purchase price of a pack of cigarettes was $8.18, of which a minimum of $4.035—nearly 50%—was represented by state and federal excise taxes.[4] If cigarettes were sold at retail for $4 per pack instead of $8 per pack, smoking rates—particularly smoking rates for children—would jump. And, in turn, rates of nicotine addiction and tobacco-related death and disease would also rise.

In 1980, the year that this Court held in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), that the State of Washington could constitutionally require the collection of the State's tax on sales of cigarettes made on the reservation to non-members of the tribe, the State's cigarette tax was only 16 cents per pack.[5] As evidence of the consequences of cigarette smoking and the effectiveness of higher prices as a tobacco control measure became clearer, the State increased its cigarette tax—to 81.5 cents per pack in 1995, $1.425 in 2001 (by popular referendum), $2.025 in

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[4] Orzechowski & Walker, *The Tax Burden on Tobacco* Vol. 52 (2017).

[5] *Id.*

2005, and $3.025 in 2010.[6] At the same time, the federal tax on cigarettes rose from 39 cents to $1.01 per pack in 2009.[7] Although the State tax increases produced additional revenue for the State, the principal benefit of these tax increases was to cut smoking rates—particularly among children. In proposing the $1.00/pack tax increase in 2010, Governor Christine Gregoire made clear that reducing consumption was one primary purpose of the tax increase. She stated, "Tobacco, in all its forms, continues to be a major health hazard. Increasing the price of cigarettes and tobacco products reduces consumption, especially among young people."[8] In 2000, the smoking rate among 10th grade students in the State of Washington was 19.8%; by 2016, the smoking rate among that age

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[6] Laws of 1994, 1st Spec. Sess., ch. 7, §§ 901-09, 911, 912, and 915(2), https://www.sos.wa.gov/elections/initiatives/statistics_ referendumbills.aspx; Initiative Measure 773 (Nov. 2011), https://www.sos.wa.gov/elections/results_report.aspx?e=21&c=&c2=&t=&t2=5&p=&p2=773&y=, https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/voters%27pamphlets/2001_general_election_voters_pamphlet.pdf; Laws of 2005, ch. 514, § 1102, http://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bills/Session%20Laws/House/2314-S.SL.pdf; Laws of 2010, 1st Spec. Sess., ch. 22, § 3, http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Session%20Laws/House/2493-S.SL.pdf. The tax increase approved by voters in 2001 became effective in 2002.

[7] Children's Health Insurance Program Reauthorization Act of 2009, Public L. No. 111-3, 123 Stat. 8.

[8] Message from Governor Christine Gregoire to legislative leaders (Feb. 17, 2010), https://blogs.sos.wa.gov/FromOurCorner/wp-content/uploads/2010/02/Feb_17_2010_packet.pdf.

group in the State of Washington had fallen to 6.3%.[9] Adult smoking rates fell also, from 20.7% in 2000 to 15.2% in 2010.[10] Cigarette tax increases during this period account contributed to that decline.

The Supreme Court's holding in *Colville* was particularly important in Washington because of the many federally recognized Indian tribes in the State.[11] Understanding the importance of cigarette taxes as a tobacco control measure, as well as respecting legitimate tribal interests, the State enacted legislation that authorized the governor to enter into compacts with all 29 tribes that would provide for the State to forgo collection of the State tax on cigarettes sold on the reservation to non-tribal members on the condition that the tribe impose and collect a tribal tax at or near 100% of the State tax.[12] Thus, through the compacts, Washington preserved the principal purpose of the tobacco tax—maintenance of high prices for cigarettes—even though it was the tribe, and not the State, that

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[9] Washington State Healthy Youth Survey, Analytic Report 62 (2016), https://www.doh.wa.gov/Portals/1/Documents/Pubs/160-193-HYS-AnalyticReport2016.pdf.

[10] CDC, Behavioral Risk Factor Surveillance System. A change in survey methodology prevents an accurate direct comparison of adult smoking rates for years after 2010 with those before. However, using the revised methodology, adult smoking rates fell from 17.5% in 2011 to 14% in 2016.

[11] Washington State Federally Recognized Indian Tribes, https://goia.wa.gov/tribal-directory/washington-state-federally-recognized-Indian-tribes.

[12] Wash. Rev. Code §§ 43.06.460, 43.06.465, 43.06.466. The legislation applicable to almost all of the tribes permitted a three-year phase-in of the tribal tax before it reached 100%.

received the tax revenue. The State has entered into such compacts with 24 of the 29 tribes.[13]

For Indian tribes that have no compacts with Washington in effect, the current practice is to allocate the total number of cigarettes received for sale on the reservation between those that are estimated to be sold to tribal members and those that are estimated to be sold to non-tribal members.[14] The State tax applies to the latter but not to the former. Currently, there is no compact in place between the State and the Yakama tribe.

II. THE DECISION BELOW, IF AFFIRMED, COULD UNDERMINE THE EFFECTIVENESS OF STATE CIGARETTE TAXES AS A TOOL TO REDUCE SMOKING.

Amici are concerned that the decision below, if affirmed, could undermine the efforts of Washington and other States to use tobacco taxes as a public health tool to discourage smoking, particularly by youth. The potential magnitude of the loophole in the States' ability to uniformly impose cigarette taxes—and the consequent gap in a central component of the tobacco control policy of many States—is enormous. The decision potentially could be used to support an argument for exempting from taxation not only sales that occur on the reservation, but also sales anywhere so long as the product is transported on

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[13] https://dor.wa.gov/sites/default/files/legacy/Docs/Pubs/CigarTax/CigaretteTax.pdf

[14] The constitutionality of such allocation systems was confirmed in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

highways. Thus, it could be argued that tax-exempt product could be transported to and sold at retail in downtown Seattle or even in downtown New York City.

Indeed, in a case currently pending before the United States Court of Appeals for the Second Circuit, a corporation wholly owned by members of the Yakama Nation recently filed a brief asserting an exemption from tobacco taxes imposed by the State of New York, and cited the Washington Supreme Court's decision as support for that challenge.[15]

In *Colville,* a case that also involved the Yakama Nation, the Supreme Court recognized that "Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers" with respect to sales made to non-tribal members on the reservation.[16] Application of the Supreme Court of Washington's decision to tobacco taxes would permit the Yakama to "market their exemption from taxation" at the expense of the public health not only in Washington but nationwide. *Amici* neither concede nor suggest that the rationale underlying the decision of the Supreme Court of Washington would preclude the State from collecting taxes on tobacco products. But it is clear that an affirmance by this Court would be used as ammunition for challenges to cigarette taxes.

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15 *New York v. Mountain Tobacco Co., supra* n.2.

16 *Colville,* 447 U.S.at 158.

III. THE STATE INTEREST IN PROTECTING THE PUBLIC HEALTH BY THE COLLECTION OF TOBACCO TAXES IS STRONG.

A. The States' Interest in Reducing Cigarette Smoking is Strong.

The State of Washington, like other States, has a strong interest in the effective implementation of measures that decrease cigarette smoking. One of the most effective such measures is maintenance of a high tax on cigarettes in order to ensure a high retail price, which in turn discourages consumption.

This Court has recognized that cigarette smoking is "perhaps the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Despite progress in reducing the level of cigarette smoking in the United States in recent years, in 2014, the U.S. Surgeon General called the epidemic of smoking one of the "greatest public health catastrophes of the [twentieth] century."[17] And this Court has acknowledged that curbing the use of tobacco products, particularly among young people, is a significant state interest. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 US 525, 555 (2001) (noting that the importance of Massachusetts' "interest in preventing the use of tobacco products by minors" was uncontested); *Brown & Williamson*, 529 U.S. at 161 ("By no means do we question the seriousness of the problem that the FDA has sought to address" through its 1996 effort to regulate tobacco products).

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[17] *2014 SG Report* at 1.

Despite the efforts of public institutions to reduce the prevalence of tobacco usage over the last half-century, smoking remains our nation's leading cause of preventable death, killing more than 480,000 Americans every year.[18] Indeed, smoking causes more deaths annually than the total deaths combined from HIV, illegal drug use, alcohol use, motor vehicle injuries, suicides, and murders.[19] On average, long-term smoking reduces life expectancy by at least 10 years and an estimated 16 million Americans suffer from smoking-related diseases.[20]

As a result of its toll on public health, smoking has a staggering economic impact, particularly on the nation's health care system. Overall, the annual costs attributable to smoking in the United States are between $289 billion and $333 billion, including at least $130 billion for direct medical care for adults, and over $155 billion for lost productivity due to premature death resulting from smoking-related diseases.[21]

In short, it is beyond dispute that Washington, like all States, has a powerful interest in protecting and promoting the health of its citizens, and that reducing use of tobacco products is a key element in advancing that goal.

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[18] *2014 SG Report* at 678.

[19] CDC, *Health Effects of Cigarette Smoking*, Fact Sheet (2018), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm.

[20] Prabhat Jha, M.D. et al., *21st Century Hazards of Smoking and Benefits of Cessation in the United States*, 368 New Eng. J. Med. 341, 341-50 (2013); *2014 SG Report* at 870.

[21] *2014 SG Report* at 11.

B. Curbing Youth Smoking Is Essential to Further Reduce Tobacco-Related Disease and Death.

Smoking typically begins in youth. The vast majority of adult smokers start smoking before age 18 and 98% do so by age 26.[22] Two-thirds of adult smokers became everyday smokers at or before age 18.[23] This makes youth the key battleground in the fight against the tobacco epidemic in the United States: if young people can avoid tobacco when they are underage, it is highly unlikely that they will ever become regular smokers.

Despite the significant decline of youth smoking since the mid-1990s,[24] 8% of high school students today smoke cigarettes—that is, approximately one out of every twelve children is a current smoker by the time he or she leaves high school.[25] At current smoking rates, 5.6 million

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[22] *2014 SG Report* at 17.

[23] Dep't of Health & Human Servs., Center for Behavioral Health Statistics and Quality, *National Survey on Drug Use and Health* (2014), http://doi.org/10.3886/ICPSR36361.v1; *Key Substance Use and Mental Health Indicators in the United States: Results from the 2015 National Survey on Drug Use and Health* (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.htm#tobacco.

[24] *See* CDC, *Trends in the Prevalence of Tobacco Use National YRBS: 1991—2017*, https://www.cdc.gov/healthyyouth/data/yrbs/pdf/trends/2017_tobacco_trend_yrbs.pdf; CDC, *2017 National Youth Tobacco Survey*, https://www.cdc.gov/tobacco/data_statistics/surveys/nyts/index.htm.

[25] *Id.*; CDC, *Youth and Tobacco Use* (2018), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm.

children under age 18 alive today will eventually die from smoking-related disease.[26]

C. Collecting Cigarette Taxes Is One of the Most Effective Ways To Reduce Smoking, Especially Among Youth.

1. The Inverse Relationship between Cigarette Prices and Smoking is Well Established.

The consumption of cigarettes is inversely related to their retail price. Not only is this relationship consistent with the basic law of economics, it is also well documented by numerous economic studies,[27] authoritative reports by the Surgeon General,[28] international treaties,[29] reports

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[26] *2014 SG Report* at 13-14.

[27] *See, e.g.*, Kevin Davis et al., *Cigarette Purchasing Patterns Among New York Smoking: Implications for Health, Price, and Revenue* (2004), https://www.health.ny.gov/prevention/tobacco_control/docs/cigarette_purchasing_patterns.pdf; John A. Tauras, *Public Policy and Smoking Cessation Among Young Adults in the United States*, 68 Health Pol'y 321 (2004); Frank J. Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco Control Policies on the Demand for Tobacco Products*, 1 Nicotine & Tobacco Res. J. S105 (1999).

[28] *See* Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* 175-78 (1994), https://www.cdc.gov/tobacco/data_statistics/sgr/1994/index.htm; Dep't of Health & Human Servs., *Reducing Tobacco Use: A Report of the Surgeon General* 322-56 (2000), https://www.cdc.gov/tobacco/data_statistics/sgr/2000/index.htm; Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults* (2012), https://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf; *2014 SG Report* at 788-92, 869.

by the World Health Organization,[30] judicial decisions,[31] and even internal tobacco company documents.[32]

The National Cancer Institute and WHO have recently concluded that "[a] substantial body of research . . . shows that significantly increasing the excise tax and price of tobacco products is the single most consistently effective tool for reducing tobacco use."[33] The Surgeon General also recommends increasing tobacco taxes to discourage tobacco use,

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[29] *See, e.g.*, WHO, *WHO Framework Convention on Tobacco Control* 6-7, http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf?ua=1.

[30] *Id.*

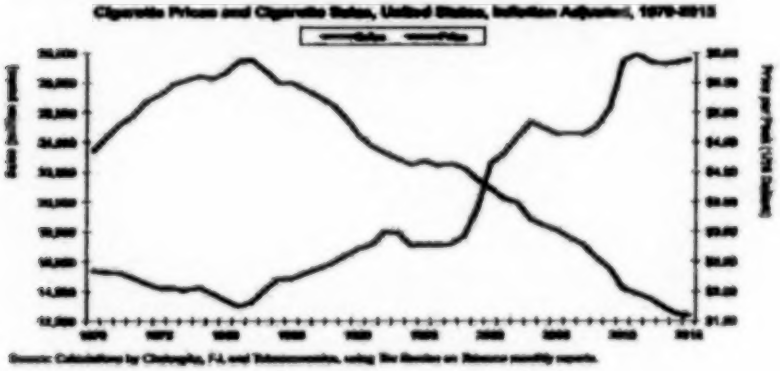
[31] *United States. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 639-45 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009).

[32] *See* Frank J. Chaloupka, Ph.D., Distinguished Professor of Economics, University of Illinois at Chicago, Testimony Before New York City Council Committee on Health on Intros 2012 and 250A (May 1, 2013) ("Chaloupka Testimony") at 14-17. *See also* Frank J. Chaloupka et al., *Tax, price and cigarette smoking: evidence from the tobacco documents and implications for tobacco company marketing strategies*, 11 Tobacco Control J. i62 (2002).

[33] U.S. Nat'l Cancer Inst. & WHO, *The Economics of Tobacco and Tobacco Control, National Cancer Institute Tobacco Control Monograph* 21, NIH Publication No. 16-CA-8029A, Bethesda, MD: U.S. Dep't of Health & Human Servs., Nat'l Inst. of Health, Nat'l Cancer Inst.; and Geneva, CH: WHO; 2016, https://cancercontrol.cancer.gov/brp/tcrb/monographs/21/docs/m21_complete.pdf.

especially among youth, in order to promote public health.[34]

The general consensus among scientific researchers is that nationally, every 10% increase in the real price of cigarettes reduces adult smoking by about 2%, reduces smoking among young adults by 3.5%, reduces the number of children under age 18 who smoke by 6-7%, and reduces overall cigarette consumption by approximately 3-5%.[35] Indeed, as illustrated by the graph below, the trends in cigarette prices and overall U.S. cigarette consumption from 1970 to 2015 show a strong correlation between increasing prices and decreasing consumption.



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[34] *See 2014 SG Report* at 12 ("The evidence is sufficient to conclude that increases in the prices of tobacco products, including those resulting from excise tax increases, prevent initiation of tobacco use, promote cessation, and reduce the prevalence and intensity of tobacco use among youth and adults.").

[35] David T. Levy et al., *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Control Scorecard*, 10 J. Pub. Health Mgmt. & Prac. 338, 339-40 (2004).

The correlation between prices and tobacco consumption by youth is even more pronounced: smoking among children under age 18 is almost three times more responsive to price increases than is smoking among adults.[36]

The following chart shows how closely linked youth smoking prevalence is to cigarette pack prices. As prices climbed in the late 1990s and early 2000s, youth smoking rates declined; but as the price decreased between 2003 and 2005 (along with decreased funding for tobacco prevention programs in many states), youth rates increased. More recently, spurred in part by the large jump in price in 2009 from the many state cigarette tax increases and the large federal tobacco tax increase, youth smoking rates have fallen more rapidly.[37]

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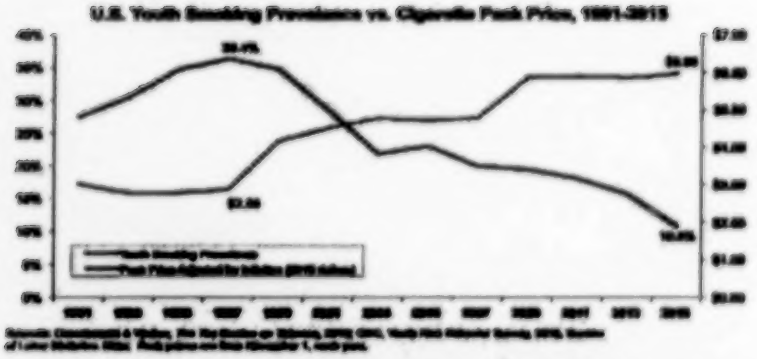
[36] Chaloupka Testimony at 4.

[37] *See* Orzechowski & Walker, *The Tax Burden on Tobacco* Vol. 51, 1970-2016, https://www.healthdata.gov/dataset/tax-burden-tobacco-volume-51-1970-2016-0; CDC, *The 2015 Youth Risk Behavior Survey* (2016). *See also* Jidong Huang & Frank J. Chaloupka, *The Impact of the 2009 Federal Tobacco Excise Tax Increase on Youth Tobacco Use* (Nat'l Bureau of Econ. Research, Working Paper No. 18026, 2012).



2. Imposition of High Excise Taxes on Cigarettes Is a Proven Effective Tobacco Control Policy.

Cigarette taxes are not imposed simply to raise revenue. They have proven to be one of the most effective policy tools society has to reduce smoking. Federal and state cigarette taxes have a heavy impact on the retail prices of cigarettes. The cost of producing cigarettes is very low and taxes, imposed on manufacturers and distributors of cigarettes and passed through to consumers in the retail prices of cigarettes, represent a high percentage of the total cost of cigarettes.[38] In every single state that has significantly raised its cigarette tax rate, pack sales have gone down sharply.[39]

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[38] The federal tax on cigarettes is imposed on manufacturers. State and local taxes are generally imposed on distributors. All such taxes are passed on to consumers in the retail prices of cigarettes.

[39] Orzechowski & Walker, *The Tax Burden on Tobacco* Vol. 52 (2017).

The Washington State Department of Health has itself acknowledged the central role played by tobacco taxes in reducing consumption: "[T]obacco-free laws and policies are also crucial in reducing tobacco use rates and mortality. . . . Many studies have shown that cigarette tax increases and price increases reduce smoking in both youth and adults."[40] Similarly, tax increases in many other states have been enacted with the express purpose of reducing smoking by raising the price of cigarettes. For example, Indiana increased its cigarette tax in 2007 after Governor Mitch E. Daniels, Jr. declared in his State of the State speech

> We have it in our power to make a huge difference. We know how to reduce smoking, and in particular to dissuade young people from starting to smoke. It starts with a higher price for the product. It is no coincidence that Hoosiers pay less for cigarettes than the vast majority of Americans and smoke at the highest rates around. But we can and must do more.[41]

In California in 2016 voters approved a $2 per pack increase in the cigarette tax after the Official Voter Information Guide explained that an argument for the increase was that "the excise tax increase would

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[40] Washington State Dep't of Health, *Washington State Tobacco Prevention and Control Five-Year Strategic Plan: State Fiscal Year 2017-2021* (2016), https://www.doh.wa.gov/Portals/1/Documents/Pubs/340-131-2017TobaccoStrategicPlan.pdf.

[41] Mitch E. Daniels, Jr., Governor, State of the State Address (Jan. 7, 2007).

result in higher prices for consumers. As a result, consumers would reduce their consumption of cigarettes and other tobacco products."[42]

D. Avoidance of Cigarette Taxes Increases Youth Consumption of Cigarettes and Undermines Public Policies Designed to Protect the Public Health

In light of the compelling evidence of the power of cigarette taxes to decrease consumption, particularly among young people, the importance of this case is clear. Cigarette taxes achieve their purpose of reducing cigarette consumption only if they are collected. Uncollected cigarette taxes are not passed through in retail prices and result in the availability of low-priced cigarettes that undermine policies designed to protect the public health. As documented above, the price difference between cigarettes on which taxes have actually been collected and cigarettes on which taxes have not been collected can be enormous—in Washington State, excise taxes account for nearly half of the average price of a pack cigarettes. The consequential availability of untaxed cigarettes at a sharply lower price would dramatically reduce a critical barrier to smoking, with a particularly pronounced effect on youth.

Moreover, as Petitioner has pointed out, the decision below could be used to support an argument that could exempt from taxation cigarettes sold by a Yakama trial member or tribal company anywhere in

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[42] Official Voter Information Guide 51 (Cal. Gen'l Election, Nov. 8, 2016), http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf.

the U.S. Thus, the public health effects of upholding the decision would not be confined to cigarettes sold on Yakama lands in Washington; rather, such an outcome would potentially undermine the policy choices of States across the nation for which tobacco taxes are an important, effective component of their public health strategies.

CONCLUSION

Amici urge the Court to reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici*

1. The American Cancer Society Cancer Action Network

The American Cancer Society Cancer Action Network (ACS CAN) is the nation's leading cancer advocacy organization dedicated to making cancer issues a priority. Created in 2001 as the nonprofit, nonpartisan advocacy affiliate of the American Cancer Society, ACS CAN educates the public, government officials, and candidates about cancer's devastating impact on public health and encourages them to make fighting cancer a top priority. Despite decades of declines in cigarette smoking prevalence, almost one-third of cancer deaths in the US are still caused by smoking. Cigarette smoking increases the risk of 12 cancers: oral cavity and pharynx, larynx, lung, esophagus, pancreas, uterine cervix, kidney, bladder, stomach, colorectum, liver, and acute myeloid leukemia. Thus, in order to save lives, ACS CAN works to promote tobacco control at the federal, state, and local levels nationwide.

2. The American Heart Association

The American Heart Association ("AHA") is a voluntary health organization that, since 1924, has helped protect people of all ages and ethnicities from the ravages of heart disease and stroke. AHA is one of the world's premier health organizations, with local chapters in all 50 states, as well as in

Washington D.C., and Puerto Rico. The association invests in research, professional and public education, community-based programs, and advocacy so people across America can live stronger, longer lives. AHA has long been active before Congress and regulatory agencies on tobacco and other health-related matters, including seeking regulation of cigarettes and other tobacco products under the Federal Food, Drug, and Cosmetic Act.

3. The American Lung Association

The American Lung Association is the nation's oldest voluntary health organization. Because smoking is a major cause of lung cancer and chronic obstructive pulmonary disease (COPD), the American Lung Association has long been active in research, education and public policy advocacy regarding the adverse health effects caused by tobacco use. This includes supporting increases in the price of tobacco products through tobacco taxes and other policies.

4. The Campaign for Tobacco-Free Kids

The Campaign for Tobacco-Free Kids is a leading force in the fight to reduce tobacco use and its deadly toll in the United States and around the world. The Campaign envisions a future free of the death and disease caused by tobacco, and it works to save lives by advocating for public policies that prevent kids from smoking, help smokers quit and protect everyone from secondhand smoke.

5. Truth Initiative

The Truth Initiative envisions an America where tobacco is a thing of the past and where all youth and young adults reject tobacco use. Truth Initiative's proven effective and nationally recognized public education programs include truth®, the national youth smoking prevention campaign that has been cited as contributing to significant declines in youth smoking; EX®, an innovative smoking cessation program; and research initiatives exploring the causes, consequences, and approaches to reducing tobacco use. Truth Initiative also develops programs to address the health effects of tobacco use–with a focus on priority populations disproportionately affected by the toll of tobacco–through alliances, youth activism, training, and technical assistance. Located in Washington, D.C., Truth Initiative was created as a result of the November 1998 Master Settlement Agreement between attorneys general from 46 states, five U.S. territories, and the tobacco industry.

No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Washington

BRIEF OF *AMICUS CURIAE* SACRED GROUND LEGAL SERVICES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus is a nonprofit legal services provider serving low income members of the Yakama Nation and other federally recognized tribes in central Washington State.

Counsel for *amicus* served as legal counsel for the Yakama Nation from 1989 to 1995 and was trial counsel in *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994) and *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). *Amicus* was counsel for the Yakama Nation Commerce Association in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007).

Counsel for *amicus* was directly and extensively involved in the cases primarily relied upon by the Washington State Supreme Court. As such, the participation of *amicus* will be helpful to the Court.[1]

SUMMARY OF ARGUMENT

Petitioner State of Washington conveniently failed to disclose that the Washington State Constitution requires that the tax petitioner seeks to collect is dedicated exclusively for the purpose of maintenance of

[1] Petitioner consented to the filing of this brief. Respondent has also consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* or its counsel made a monetary contribution for the preparation or submission of this brief.

public roads. Yakama Indians were guaranteed the free use of and access to public roads in the Treaty between the United States and the Yakama Nation.

The State has previously litigated the issue of whether it may impose its excise taxes upon Yakama Nation travel and should be bound by those judgments.

According comity to the decision of the Washington State Supreme Court in a case interpreting the applicability of the State's own laws will not result in the "tremendous loophole" the State and the United States contend.

The Washington State Legislature created its own difficulty in collecting its fuel tax when it undertook to move the incidence of the tax from retailers to distributors importing fuel into the State. It was never contemplated by the State in enacting such legislation that a tax exempt treaty Indian might possess the temerity, resources or audacity to successfully become a fuel distributor.

Established principles of equity preclude courts from extricating the State from a problem created by itself.

The State possesses authority to assess and collect motor vehicle fuel excise taxes from the ultimate purchasers of the fuel from tribal retailers. The fact that the State lacks the political courage to do so does not merit this Court varying from established law.

ARGUMENT

A. The Washington State Constitution expressly states that motor vehicle fuel excise tax revenues are to be used exclusively for the maintenance of public roads. The Yakama Treaty guaranteed that the Yakama Nation would not be charged for the maintenance of public roads.

1. The State of Washington conveniently omits from its brief any information on *how* the tax it seeks to collect is *used*. The tax must be used for the purpose of construction, maintenance and improvement of public roads in the State of Washington. As stated in the Washington State Constitution:

> Art. 2 Section 40 HIGHWAY FUNDS. All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, *shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes.* Such highway purposes shall be construed to include the following:
>
> (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
>
> (b) The *construction, reconstruction, maintenance, repair, and betterment of public*

> *highways*, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

Washington Const., Art. 2, §40 (emphasis added).

According to the Washington State Department of Transportation, the history of tribal transportation pre-dates contacts with Europeans when tribes had extensive transportation routes for travel and exchange of goods:

> For many tribes the history of tribal transportation begins with the trails of the animals, which became the trails the tribes used.

Tribal Transportation Planning Guide for Washington State, Washington State Department of Transportation (2009),[2] p. 9. Most public highways in Washington State were located upon trails which were used since Time Immemorial by the original inhabitants of the Pacific Northwest, in particular the Yakama Indians. Over time, those existing Indian routes developed into wagon roads—including the Mullan, Kentuck, Colville, Texas, and Old Territorial roads—that carried miners

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[2] https://www.wsdot.wa.gov/NR/rdonlyres/D9668173-F25F-448B-B571-57EB32122036/0/TribalTransportationPlanningGuideforWashingtonState.pdf.

and settlers in and out of the interior, in addition to their continued use by area tribal members who used them to reach hunting, gathering, and fishing sites and to visit other Indian communities to socialize, trade, and form political alliances:[3]

> The Yakama Indian guides with the survey party encouraged McClellan[4] to continue north to Snoqualmie Pass, but he refused. That pass would later be explored by Lieutenant Abiel Tinkham (ca. 1824-1871), who Stevens sent into the Cascades in January 1854 after McClellan, this time making the attempt from the west side, failed a second time to cross the mountains, again citing heavy snow. Approaching from the east, Tinkham hired Indian guides to take him through Yakima Pass into the Cedar River drainage.

Id. McClellan, meeting with Yakama head chief Kamiakin in 1854, informed the latter that "it was the intention of the whites to make a wagon road across the mountains, and many would undoubtedly pass through their country" and that "their coming would be an advantage to his people."[5]

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[3] *See Walla Walla to Seattle Historic Wagon Roads* (2014), http://www.historylink.org/File/10757.

[4] In 1853, U.S. Army Lieutenant George McClellan was commissioned by then Secretary of War Jefferson Davis and Washington Territorial Governor Isaac Stevens to survey potential military roads to the Pacific Northwest. *Walla Walla to Seattle Historic Wagon Roads, supra.*

[5] *Annual Report of the Commissioner of Indian Affairs* (1854) (U.S. Govt. Printing Office), p. 385. http://digicoll.library.wisc.edu/

Unlike other tribes within what is now *Western* Washington State whose treaties had an express clause limiting their *trading* activities, *United States v. Wilbur,* 674 F.3d 1160 (9th Cir. 2012); *United States v. Baker*, 63 F.3d 1478 (9th Cir. 1995), no such limitation upon *travel* appears in the Yakama Treaty.[6] A treaty is in its nature a contract between nations. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232-1233 (2014) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.)). Like federal laws, agreements embodied in treaties are accorded status as the Supreme Law of this nation. U.S. Const., Art. VI, cl. 2 (Supremacy Clause).[7] Great nations, like great men [and women] keep their word. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

The 1855 Treaty between the United States and the tribes and bands comprising the Yakama Nation secured to Yakama Indians a right to free use of and access to public highways in common with citizens of the United States. Nowhere in the Treaty, nor in the

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cgi-bin/History/History-idx?type=turn&entity=History.AnnRep54.p0235&id=History.AnnRep54&isize=M.

[6] "[T]he Medicine Creek Treaty did not expressly grant any right to the Puyallup Tribe . . . [the] ambiguous treaty language stands in stark contrast to the text of the Yakama Treaty." *United States v. Smiskin*, *supra* at 1267.

[7] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

journal of treaty negotiations kept by the United States negotiators, is it mentioned that Yakamas would be charged a tax or fee for their travel upon such highways. *See Official Proceedings of the Council in the Walla Walla Valley, June 9 & 11, 1855.*[8]

Certainly, outside Indian Country in the absence of a right reserved by Treaty, the State may impose nondiscriminatory State taxes upon an individual member of an Indian Tribe on the same basis as other citizens. However, where as in this case imposition of a State tax burdens the exercise of a Treaty right it may not be imposed.

Just as the Petitioner fails to address the importance of the Washington State Constitution's mandate that the State's motor vehicle fuel taxes are for the use of public roads, the United States attempts to minimize the breadth of rights reserved in the Yakama Treaty. Certainly, as stated by the Government, "one of the United States' major aims in entering into the treaty was to enable the construction of public highways and railroads in the region." (U.S. *Amicus* Brief at 2). However, this was merely *one* of *many* aims of the United States in entering the Treaty. The Treaty was also intended to further Yakamas "for the instruction of the Indians in trades and to assist them in the same." Yakama Treaty, Art. V (Joint Appendix 83a).

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[8] https://www.lib.uidaho.edu/mcbeth/governmentdoc/1855council.htm.

Given the numerous cessions the Yakama made[9] which benefitted the United States, it could not have been contemplated that payment of a tax would be required of Yakama Indians to obtain fuel necessary to power the industries promised they could engage in.

Finally, the Court should note the State's portrayal of this case as merely involving application of Washington State's fuel tax to Respondent Cougar Den, "a fuel company owned by a member of the Yakama Nation". Brief of Petitioner State of Washington Department of Licensing, 1. Respondent Cougar Den is designated by the governing body of the Yakama Nation as the exclusive distributor of motor vehicle fuel to tribal retailers within the Yakama Reservation (Joint Appendix 99a) and serves:

> [A]s an *agent* of the Yakima Indian Nation for the purpose of collecting and transmitting Tribal taxes to the Yakima Indian Nation on a monthly basis and for the purpose of obtaining petroleum products for sale and delivery to the Yakima Indian Nation and its members.

Id. (emphasis added). *See also* Oregon Department of Transportation OAH Case No. 1102410 at 3, 10 ("Cougar Den acts as the agent for the Yakama Nation to obtain fuel in Oregon for export to the Yakama Nation"). The issue in this case is the applicability of the Washington motor vehicle fuel excise tax to a tribal importer of fuel. The brief of *amicus curiae* United States

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[9] *See* Joint Appendix 101a (map of area ceded to United States).

explicitly frames the Question Presented as involving the applicability of "a tax imposed by the State of Washington on fuel purchased out-of-state *and imported into Washington*" (Brief of United States at I) (emphasis added). The State of Washington's own statutory scheme states *inter alia* as follows:

> "Importer" means a person who imports fuel into the state by a means other than the bulk transfer-terminal system. If the importer of record is acting as an agent, *the person for whom the agent is acting is the importer.*

RCW 82.38.020(18) (emphasis added).[10] Washington's characterization of this case as a dispute between the State of Washington and an individual tribal member owned business is therefore deceptive. Since Cougar Den serves as an agent of the Yakama Nation, the "importer" of the fuel in this case is the respondent's *tribe*. Indian tribes are immune by virtue of sovereign immunity from State taxation. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505 (1991). Such immunity extends to off-reservation commercial activities. *Richardson v. Mount Adams Furniture (In Re Greene)*, 980 F.2d 590 (9th Cir. 1992); *Wright v. Colville Tribal Enterprise Corp.*, 159 Wn. 2d 108 (2006).

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[10] *See also* the Yakama Nation's designation of Respondent as agent (Joint Appendix 99a) and the State of Oregon Administrative Law Judge's opinion concluding Respondent was agent of Yakama Nation for purposes of obtaining Oregon fuel distributor license (Oregon Department of Transportation OAH Case No. 1102410) (Feb. 7, 2012).

Since resolution of this case should be as simple as that, perhaps this Court in the interest of Comity should consider merely remanding or certifying the case to the Washington court to confirm that the respondent was indeed acting in the capacity of agent for respondent's tribe—in which case the tribe's immunity would preclude the State's efforts to collect the tax. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).[11]

B. Accepting the arguments of the State and the United States which place Yakama Indians on the same basis as all State citizens would render their treaty right meaningless.

The essence of the State's argument is that the Yakama Treaty merely placed Yakamas on the same basis as all other citizens. *See* Brief of Petitioner State of Washington, at 42-43 (affirming the Washington State Supreme Court would give Yakamas an "unfair advantage"). Such arguments have been routinely

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[11] That Washington considered the respondent's tribe to be the real party in interest upon whom the tax was imposed and which bore ultimate liability is demonstrated by the State's open admission that, although it moved the incidence of the tax from fuel retailers to fuel importers in response to the 2005 decision in *Squaxin Island Tribe, supra* (Brief of Petitioner at 6), Washington negotiated with the Yakama *Tribe* through November 2013 rather than the *respondent* for payment of the tax (*see* Oil Marketers Brief at 6, "state settles with tribe for $9 million"). *See also* Joint Appendix 107a (tribe vetoes settlement agreement).

rejected by this Court. As stated in *United States v. Winans*, 198 U.S. 371 (1905):

> [I]t was decided [below] that the Indians acquired no rights but what any inhabitant of the Territory or State would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the Nation for more.

Such an argument was similarly rejected by this Court in *Washington v. Washington Passenger Fishing Vessel Association*, 443 U.S. 658, 681 (1979). *See also Seufert Brothers Company v. United States*, 249 U.S. 194, 198 (1919) and *Tulee v. Washington*, 315 U.S. 681, 684 (1942), both holding that treaty Indians had rights, "beyond those which other citizens may enjoy." *Passenger Fishing Vessel, supra.*

C. The State should be estopped from repeatedly relitigating the applicability of taxes on Yakama's use of public roads and should be bound by its own contrary statements in previous cases in this Court.

The similarity of the State's conduct in this case and prior cases in which the State of Washington sought to disregard tribal treaty rights is striking. The State has presented these same arguments—that the State may charge the respondents a tax or fee for the purpose of maintaining public roads—in numerous

federal trial and appellate courts and been rejected,[12] not to mention in the courts of its own State. *See Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998); *Cougar Den Inc. v. Washington State Department of Licensing*, 188 Wn. 2d 55 (2017); *see also* the citations to numerous Washington State district court prosecutions referenced in *Flores*, 955 F. Supp. at 1245.

Flores involved an attempt by the State of Washington to impose a regulatory fee upon logging trucks owned by Richard "Kip" Ramsey, a member of the Yakama Nation. Ramsey is also the owner of the respondent in this cause, Cougar Den, Inc. According to principles established by this Court, "[a] party that has once litigated a factual or legal issue and lost may be precluded from litigating the same issue in a subsequent proceeding." *See Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1978); *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414-15, 66 L. Ed. 2d 308 (1980); *Connors v. Tanoma Min. Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992). That this case involves the same issues which were previously litigated by the State with the same *de facto* party is demonstrated by *Flores*, where the district court noted:

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[12] "Despite the unambiguous promises made to the Yakamas, defendants argue that the Yakamas 'must' have known that 'in common with' meant that tribal members stood on the same legal ground as non-Indians for the purposes of financing and maintaining public roads." *Flores, supra* at 1249.

> Given the fact that Stevens and his agents viewed the Yakamas and other tribes at the Council as unlearned savages, it is highly unlikely that he would have expected payment from them in order to maintain public highways.

In this appeal, both the State and the United States argue that the motor vehicle fuel excise tax is not imposed for the *use* of roads but rather is imposed upon the *possession* of a product (*Amicus* Brief of United States, 12). The duplicity of such arguments is shown by the opposite positions that were taken by the State and United States in *Colville, supra*, where the State of Washington argued that the State's motor vehicle excise tax was for the "use" of State highways rather than a personal property tax. As stated by this Court:

> The next issue concerns the challenge in the *Colville* case to the Washington motor vehicle and mobile home, camper and travel trailer taxes. Although not identical, these taxes are quite similar. Each is denominated an excise tax for the "privilege" of *using* the covered vehicle in the State, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed upon vehicles owned by the Tribe or its members and *used* both on and off the reservation[.]

447 U.S. at 162 (emphasis added):

> [T]he only difference between the taxes now before us and the one struck down in *Moe* is that these are called excise taxes and imposed

> for the privilege of using the vehicle in the State, while the Montana tax was labeled a personal property tax. . . . In the present case, the State continues, the taxable event is the use *within the State* of the vehicle in question.

Id. The pertinence of this point is that the Washington State Constitution dedicates *all* motor vehicle excise taxes and motor vehicle fuel excise taxes to pay for roads used by motor vehicles. Wash. Const., Art. 2, *supra*. The State and United States *now* argue that such taxes are *not* for the *use* of roads but rather are in the nature of a personal property tax imposed for the *possession* of fuel within the State. (Brief of United States at 12). Such a disingenuous reversal of positions formerly argued before this Court should not be tolerated.

Clearly, the Respondent delivers fuel exclusively to tribal retailers on the Yakama Reservation (Joint Appendix *passim*).[13] The admitted motivation for the Washington State Legislature in moving the incidence[14] of the tax to importers was to target tribal

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[13] According to the Washington Oil Marketers Association, 90% of the fuel transported by Cougar Den is delivered to two tribally licensed retail fuel filling stations. *See* Brief of *Amicus Curiae* Washington Oil Marketers, at p. 10, n. 9. The remainder is delivered to business owned by Cougar Den's owner, Kip Ramsey (a member of the Yakama Nation), in the unincorporated reservation community of White Swan, Washington. Id. According to the most recent United States Census information, the population of White Swan is approximately 90% Native American.

[14] Whether Washington's attempt to move the incidence of the tax "upstream" was actually successful is an issue that was not addressed by the lower courts and may merit remand for consideration.

businesses delivering fuel for on-reservation sales by tribal retailers. The revised statute is a back-handed way of imposing a tax upon reservation sales by tribal retailers to tribal customers which the State could not directly impose. The *burden* of the tax, however, is ultimately upon tribal persons whose vehicles are primarily used within the reservation and which, by virtue of their treaty rights, are exempt from paying a tax for their use of public roads in Washington.

It is unquestionable that motor vehicle fuel is for use in motor vehicles. The principle that State of Washington may not tax a Yakama Indian for the use or possession of fuel within the Yakama Reservation is similarly unquestionable. The only time the fuel is possessed in the State of Washington is on the 27 mile stretch of road from the boundary of Oregon to the boundary of the Yakama Reservation. Under such circumstances, the tax may not validly be applied, either by virtue of the tribe's treaty right to free use of the roads or because the State's motor vehicle fuel excise tax is not pro-rated to reflect an apportionment between on-reservation and off-reservation use of the fuel in motor vehicles. *Colville, supra* 447 U.S. at 163; *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1259-1260 (E.D. Wash. 1997), *affirmed sub nom. Cree v. Flores, supra*.

Notwithstanding that the State has previously fully litigated and lost on the issue in this case it continues to attempt to impose taxes for the maintenance of public roads upon Yakama Indians. The State openly

admits that it went so far as attempting to move the incidence of its motor vehicle fuel tax from imposition upon retailers to fuel "importers" in response to an adverse decision in *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). This caused tribal filling stations like Cougar Den to necessarily obtain their fuel supplies from outside the State of Washington, since the State of Washington Department of Licensing prohibited the sale of tax exempt fuel to tribal retailers by fuel distributors licensed to do business in Washington State. Targeting legislation or regulatory measures at a specific class of persons is reminiscent of the principle enunciated by this Court that statutes and regulations aimed at and motivated to disadvantage particular classes of persons violate constitutional protections of the Fourteenth Amendment. *United States v. Guest*, 383 U.S. 745 (1966) (violation of right to travel from State to State).[16] *See also*, the numerous pronouncement of this Court striking down State zoning laws which constituted exclusionary zoning.

Such machinations, including invoking the jurisdiction of this Court for the purpose of frustrating the adverse judgments of the federal and State appellate courts, should not be encouraged. Such conduct is reminiscent of the State's "extraordinary machinations" to resist the effect of federal court judgments referenced in *Puget Sound Gillnetters Association v. United States District Court*, 573 F.2d 1123 (9th Cir. 1978):

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[16] The Right to Travel embodied in the Yakama Treaty is similarly subject to Constitutional protection. U.S. Const., Art. VI, cl. 2 (Supremacy Clause).

> Except for some desegregation cases (see *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. McDonough v. Morgan*, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed.2d 386 (1976); *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977)), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.

This case is another chapter in the Petitioner's long campaign to maximize revenue by infringing on treaty rights and is another chapter in the State of Washington's attempt to place Yakama Indians on the same basis as all other citizens by denying Yakama retailers the ability to provide fuel for tribal vehicles unless a State tax is paid for the maintenance of all State highways—the free use of which the signers of the Yakama Treaty were guaranteed in return for relinquishing title to some 11 million acres of land (*see* Joint Appendix, 101a).

D. Petitioner State of Washington's and the United States' arguments that affirming the Washington Supreme Court will create an enormous loophole or result in the widespread transport of tax exempt fuel to other States is unfounded.

The State's argument that affirming the decision of its own supreme court will result in impairment of the State's ability to maintain roads is specious. *See*

also Oil Marketers Brief at 19 ("impact on State revenues will be nothing short of catastrophic") describing a "virtual tax immunity." Such inflated claims conceal the fact that the State of Washington receives extensive federal funding for reservation roads and the United States Bureau of Indian Affairs and the Yakama Nation maintain many of the reservation roads and that the Respondent's *tribe* imposes its *own* motor vehicle fuel tax on *all* sales of fuel by tribally licensed retailers, whether the fuel is sold to a member or nonmember of the tribe. Joint Appendix 91a.

Tribal vehicle travel is primarily upon roads within the reservation. The State of Washington receives extensive federal funding for the maintenance of Indian reservation roads. *See, e.g.*, Act of May 26, 1928, Public Law 520 (establishing Indian Reservation Roads Program), 25 U.S.C. §318(a) as do Indian tribes themselves; *see also* the Surface Transportation Assistance Act of 1982 (23 U.S.C. Chapter 2).[16]

Affirming the Washington State Supreme Court's interpretation of its own laws will not, as the petitioner contends, "create a massive loophole in State tax regimes" (Brief of Petitioner, at 2).[17] Cougar Den's tribal retail fuel stations are situated on the Yakama Reservation, 80% of which is tribal land and 20% of which is

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[16] Indian Reservation Road "means a public road that is located within or provides access to an Indian reservation or Indian trust land, or restricted Indian land." 25 C.F.R. §170 (2004).

[17] Only one other tribal treaty *in the nation* has a clause similar to that in Yakama Treaty. Treaty With the Nez Percés, 12 Stat. 957 (1859).

situated in unincorporated agricultural communities. *Brendale v. Confederated Tribes*, 492 U.S. 408, 415 (1989). 807,000 acres of the Tribe's 1.3 million acres are vacant forested lands within the reservation's "Closed Area", which is so named because it has been closed to the general public at least since 1972, when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakama Nation and to its permittees, who must be record landowners or associated with the Tribe. Id. A mere 25,000 primarily agricultural acres are not tribal lands held in trust by the United States government. 492 U.S. at 415. Most land in the "open area" is zoned General Rural, "one of three use districts governing *agricultural* properties". *Brendale, supra* at 417 (emphasis added). The State of Washington provides for refunds from its retail sales and use taxes, and certain motor vehicle fuel excise taxes, on sales for agricultural use. Revised Code of Washington §§82.08.865, 82.12.865. *See also* Washington Administrative Code §458-20-126(3)(e). A primary purpose of the United States for establishing the Yakama Reservation was agriculture. *Ecology v. Yakima Reservation Irrigation District*, 121 Wn. 2d 257 (1993).

Given such demographics, as Washington State law and administrative regulations *already* exempt fuel sold within the Yakama Reservation from taxation, the petitioner's claims of a massive loss of fuel tax revenues appears unfounded, especially when considered in light of the numerous district and court decisions holding that 4 U.S.C. §104, commonly known as

the Hayden-Cartwright Act, conferred *no* authority upon States to even impose motor vehicle fuel excise taxes on Indian reservations. *See, e.g., Marty Indian School Board v. South Dakota*, 824 F.2d 684 (8th Cir. 1987); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 28 P.3d 996 (2001), *cert. denied*, 534 U.S. 1129 (2002).

The scare tactics of the United States should similarly be disregarded. The Government argues that:

> If the Washington Supreme Court's decision is affirmed, respondent could claim a right to ship fuel from those States all over the United States and avoid paying similar fuel-import taxes in States to which it transports fuel by highway.

(Brief of *Amicus Curiae* United States, 23-24). Nowhere does such language appear in the Treaty. Rather, the scope of the right secured in the Yakama Treaty is in common with other citizens and the scope of this litigation is limited to the applicability of Washington State's fuel excise tax. Courts do not render advisory opinions on issues or involving parties not before it. *Muskrat v. United States*, 219 U.S. 346 (1911).[18]

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[18] *Amicus* is thoroughly confused by the inclusion of arguments in petitioner's and *amici*'s briefs referencing possible exemptions from various state cigarette taxes. *See, e.g., Amicus* Brief of Public Health Organizations. Such issue is not before the court and such fear mongering should not be tolerated. Unlike motor vehicle fuel, tribal retailers selling cigarettes absent proof of payment of state taxes are subject to the Contraband Cigarette

The State of Washington and *amicus* United States are not the only entities seeking to inflate the effect of the Washington State Supreme Court decision. The brief of Washington Oil Marketers inaccurately states that "the State settled with the Yakamas for $9 million" (Oil Marketers Brief at 6, n. 3). Such settlement was vetoed by the governing body of the Yakama Nation (Joint Appendix, 107a, *et seq.*)[19]

The State of Washington argues that recognition of a Treaty-based exemption from the fuel taxes it imposes would create a tremendous loophole resulting in a loss of revenue. However, Washington conveniently fails to disclose the numerous "loopholes" it has already made which enable various classes of persons and entities to avoid its tax. *See* the "refunds and credits" from the State's motor vehicle fuel excise tax enumerated in RCW 82.38.010.[20]

Trafficking Act, 18 U.S.C. §§2341, *et seq. United States v. Wilbur*, 674 F.3d 1160 (9th Cir. 2012).

[19] Counsel for *amicus* was present and seconded the motion to disapprove the proposed settlement agreement. *See* Joint Appendix, 106a).

[20] Any person may obtain a refund of the tax for off-road, farm and certain heavy equipment use; for fuel used in power pumping and take-off equipment; fuel used for logging operations; and for certain private and public transportation providers. RCW 82.38.010. *See also* RCW 82.38.080 (exemptions). Tribal Indians apparently lack the lobbying resources necessary to effect favorable state legislation. *See* RCW 82.38.180 ("fuel distributed to a federally recognized Indian tribal reservation located within the state of Washington is not considered exported outside this state").

Additionally, Cougar Den's license from the Yakama Nation *only* permits it to deliver fuel to retail fuel filling stations on the Yakama Reservation which are licensed by Yakama tribal government (Joint Appendix 99a), and Washington admits that virtually all other tribes in Washington that have gas stations within their reservation have already entered fuel tax agreements with Washington (Brief of Petitioner, at 8, text at n. 4) which would preclude them from purchasing fuel from respondent and which require payment of an agreed percentage of Washington's motor vehicle fuel excise tax. Washington's claim of a tremendous loss of state revenue therefore appears unfounded.

E. Equitable principles disfavor Courts extricating litigants from problems created by themselves.

In this case, the State of Washington's inability to collect its fuel excise tax from a Yakama fuel distributor importing fuel stems from its *own* decision to seek legislation "moving" the incidence of its tax from retailers to fuel *importers* (*see* Brief of Petitioner at 6)[21] rather than moving the incidence of the tax from fuel retailers to the *customers* of fuel retailers. It has long been established that the State of Washington may impose a tax upon purchase of goods from tribal retailers

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[21] "Most recently, the State significantly changed its approach to collecting fuel taxes in response to *Squaxin Island Tribe v. Stephens*, 400 F. Supp. 2d 1250 (W.D. Wash. 2005). There, the court held that the incidence of the tax at the time fell on retailers (gas stations)[.]" Brief of Petitioner, p. 6.

by *non-tribal* members. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).[22]

The fact that collection of the tax from non-tribal State citizens presents certain practical and political difficulties does not merit the intervention of this Court.[23] It is an established principle of equity that courts should not assist a party in extricating themselves from circumstances that he or she created. *See generally* J. Adams, *The Law of Equity* (1881) *passim*. Established principles of federalism and comity should similarly discourage this Court from reversing a decision of the supreme court of a State interpreting its own excise fuel tax statute.[24]

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[22] Although the Colville court held that principles of sovereignty did not preclude Washington from taxing the non-Indian customers of tribal retailers, it did not address whether a tribal treaty precluded such taxation.

[23] For example, States may enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax or seek relief from Congress. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 514 (1991).

[24] *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

CONCLUSION

Amicus respectfully urge the Court to affirm the decision of the Washington State Supreme Court.

Respectfully submitted,

SACRED GROUND LEGAL SERVICES

By: JACK WARREN FIANDER
Counsel for Amicus Curiae

No. 16-1498

IN THE

Supreme Court of the United States

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN INC., A YAKAMA NATION CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF OF *AMICI CURIAE* THE WASHINGTON OIL MARKETERS ASSOCIATION AND WASHINGTON ASSOCIATION OF NEIGHBORHOOD STORES IN SUPPORT OF PETITIONER

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A. INTRODUCTION

This brief is submitted on behalf of the Washington Oil Marketers Association ("WOMA") and the Washington Association of Neighborhood Stores ("WANS") in support of Washington State's position seeking reversal of the decision of the Washington Supreme Court. This brief is filed with the consent of all parties pursuant to Rule 37(3)(a).[1]

B. INTEREST OF *AMICI CURIAE*

WOMA is a nonprofit trade association with individual and corporate members that market petroleum products in Washington State and associate members that sell products and services that support the petroleum industry. WOMA members account for nearly 80% of all petroleum products sold in Washington State, including 68,000,000 gallons of heating oil to residential and industrial users.

WOMA is closely aligned with two regional trade associations: The Pacific Oil Conference and the Western Petroleum Marketers Association. WOMA is also a member of the national Petroleum Marketers Associations of America, which represents petroleum marketers on national issues in Washington D.C.

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1. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authorized this brief in whole or in part, and that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing.

WOMA is the only association in Washington State that focuses on all aspects of the petroleum marketing industry and monitors legislative and regulatory issues involving fuel, energy, alcohol, tobacco, transportation, the environment, and the state budget and taxes. WOMA also lobbies on behalf of petroleum marketers and oil heat dealers with state government agencies and the legislature in Olympia, and stays engaged with the state and national associations referenced above.

WANS is a business organization that provides information and assistance to Washington State's convenience store industry on a wide variety of topics including legal, legislative, and regulatory issues to enable that industry to remain competitive in the marketplace.

C. SUMMARY OF ARGUMENT

The legal incidence of Washington State's fuel tax occurs off the Native American reservations in that state. It applies to fuel suppliers such as Cougar Den.

Article III of the United States treaty with the Yakama Nation states in pertinent part:

> *And provided*, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

Yakama Treaty, art. III, 12 Stat. 951 (1855). While the treaty gives Yakama tribal members a right to travel without fees on public highways, the specific language of the treaty does not confer upon those tribal members a "right to trade" or a right to evade legitimate state fuel taxation. In suggesting to the contrary, the Washington Supreme Court opinion contravenes Ninth Circuit precedent interpreting the same treaty language and long-standing principles of this Court in interpreting Native American treaties.

Further, the Washington court's interpretation will effectively confer tax-exempt status on tribal fuel businesses, fundamentally damaging Washington's fuel tax revenues that are constitutionally dedicated to transportation purposes. That interpretation will create severe competitive disadvantages for businesses like the amici's members. The opinion's analysis cannot simply be confined to fuel taxes; it will also affect numerous other areas of state taxation.

D. ARGUMENT

(1) Washington Fuel Taxes

Initially, critical to this Court's decision is a clear understanding of the nature of Washington's fuel tax and its legal incidence as to entities like Cougar Den. *See also,* petitioner br. at 6-8. The motor vehicle fuel market in Washington often involves a four-tiered distribution chain. *Squaxin Island Tribe v. Stephens,* 400 F. Supp. 2d 1250, 1252 (W.D. Wash. 2005); *see, e.g.,* RCW 82.36.010(12), (13), (17). Suppliers, also called licensees, are the refineries, producers, or importers that produce,

blend or import fuel in Washington. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport fuel between suppliers and retailers. *Id.* Retailers sell fuel to consumers. *Id.* Consumers purchase fuel from the retailers for use in their vehicles. *Id.*

Suppliers refine fuel or bring fuel into Washington State by pipeline, cargo vessel, and ground transportation. *Squaxin*, 400 F. Supp. 2d at 1252. Distributors transport the fuel between suppliers, usually by purchasing fuel from suppliers at a "terminal rack," which is the platform or bay at which motor vehicle fuel from a refinery or terminal is delivered into trucks, trailers, or rail cars. *Id.*

A State cannot impose a tax on tribal activities occurring within a reservation. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165-66, 171-73 (1973) (invalidating state income tax imposed on tribal member's income earned on reservation); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 455 (1995) (noting the critical importance of the legal incidence of the tax, this Court held that a state could not impose fuel taxes on fuel sold by the tribe on the reservation, but it may tax all persons, including Native Americans, residing off-reservation). Activities outside the reservation are subject to a state's general tax laws. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146-49 (1973) (upholding state gross receipts tax imposed on tribe's ski resort operated off-reservation). The tax at issue here is subject to the latter principle. Under these authorities, a fuel tax collected from suppliers or distributors operating off-reservation that is not required to be passed down the distribution chain, as here, is a lawful tax. A tribe and its members are not immune from the economic burden of such a tax,

as this Court has recognized in upholding state fuel tax because legal incidence fell on distributors operating off-reservation. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). In cases assessing whether a tribe is immune from state taxation, this Court clarified that the "legal incidence" of a tax – where and upon whom the tax is being imposed – is often the determining factor. *Id.* at 101, *citing Oklahoma Tax Comm'n*, 515 U.S. at 458-60, 462-64.[2]

As the case law on tribal immunity and fuel taxation evolved, the Washington Legislature shifted the incidence of Washington's fuel tax. In 1994, the fuel tax was collected from distributors, who were *required* to pass the tax down the distribution chain, rather than having the option to do so. Wash. Laws of 1983, 1st Ex. Sess., ch. 49, § 26; *see also*, Wash. Laws of 1998, ch. 176, § 7. The Colville and Yakama tribes sued the State, arguing that the fuel tax was being imposed unlawfully on sales to tribal members on reservation land because the law required the tax to be passed forward and thus the real incidence of the tax fell on tribal retailers on the reservation. These lawsuits resulted in consent decrees between the State and the two

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2. The concept of tax incidence is critical to understanding the present case because the legal incidence of a tax determines whether there is a valid claim for preemption or immunity. If a tax is imposed on a distributor and is *voluntarily* passed through the chain of distribution as part of the cost of doing business, the incidence of the tax falls on the distributor, and not on any of those subsequent purchasers such as retailers or consumers. *Wagnon*, 546 U.S. at 103. Thus, those subsequent retailers and consumers are not entitled to exemption from those taxes simply because they are doing their business on tribal land, because the tax is not imposed for activities taking place on tribal land. *Id.*

tribes under which the tribes agreed to track fuel sales to members versus nontribal members. In the consent decrees, the State agreed to repay the tribes the amount of fuel taxes paid on fuel purchased by tribal members from on-reservation retailers.[3] The tribes would tell the State the number of gallons of fuel sold to tribal members, and the State would calculate the tax refund based on the total number of gallons. *Id.* Pursuant to legislative direction, Wash. Laws of 1995, ch. 320, §§ 2, 3, the State entered into agreements with other tribes on a basis akin to the consent decrees.[4]

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3. The Yakamas, one of the tribes referenced above, refused to remit to Washington State the fuel taxes they collected. News accounts indicated that the amount withheld was as much as $25 million. http://seattletimes.com/State-Yakama-Nation-agree-on-simpler-fuel-tax-system. The State sued the Yakamas to recover the past due taxes. The State settled with the Yakamas for $9 million. Simultaneously, the State entered into an agreement with the Yakamas in which the State collects the fuel tax and remits 75% of the collections to the tribe. The Yakamas agreed to pay the State $9 million but that sum will be paid from the tax revenue the Yakamas will receive from Washington State. https://www.seattletimes.com/seattle-news/state-yakama-nation-agree-on-simpler-fuel-tax-system.

4. Shortly after the 1995 fuel tax amendments, the State abandoned the "counting gallons" approach because it required substantial record-keeping requirements and imposed an administrative burden on the tribes, and instead entered into agreements based upon a formula. Under these agreements, the State agreed to disburse fuel tax revenues to the tribes based on the number of enrolled local tribal members, multiplied by the average per capita consumption of fuel statewide, disbursing to the tribes 100% of the fuel tax revenue applicable to this amount of fuel. The State entered into such agreements with numerous tribes.

In 1999, the Washington Legislature changed the point of collection for the fuel tax from distributors to suppliers in order to increase administrative efficiency and to provide greater revenues for the State. Wash. Laws of 1998, ch. 176, § 1(3). With respect to the legal incidence of the tax, however, the law still required that the tax to be passed down the distribution chain to retailers and consumers, instead of simply allowing the suppliers to choose whether to pass on the tax. *See, e.g., id.*, §§ 48(1), 81. The Legislature made no changes to the existing tribal agreements, and the authorization to enter into such agreements remained in place. *See id.*, §§ 48(2), 81.

In the early 2000s, the Squaxin and Swinomish tribes sued the State arguing that the tribes were completely immune from Washington's fuel tax, not just for sales of fuel to tribal members but for sales to *all* fuel purchasers on tribal land. They asserted that under the then-existing law,[5] the legal obligation to pay the tax fell on the retail tier of the distribution chain, including tribal retailers. *Squaxin*, 400 F. Supp. 2d at 1251. The tribes argued that because there was no consumer-level enforcement mechanism, and because retailers were not entitled to refunds if consumers failed to pay the tax, the legal incidence of the tax fell on retailers. *Id.* at 1255-57.

Relying on *Chickasaw*, a case in which the legal incidence of a state fuel tax also fell on tribal retailers, the district court in *Squaxin* enjoined the State from collecting fuel taxes on "the Tribes' retail sales of fuel

5. *See* former RCW 82.36.020. However, the law also stated that the ultimate incidence of the tax was intended to fall on consumers. *See* former RCW 82.36.407(1).

products on Tribal land." *Id.* at 1262.[6] Because the State was not permitted to tax tribes for transactions on tribal land, the court concluded that Washington fuel taxes, the legal incidence of which fell on tribal retailers, were illegal. *Id.*

In December 2006, this Court issued its decision in *Wagnon*, upholding Kansas' fuel tax because the tax was explicitly imposed on off-reservation sales to distributors and did not require those distributors to pass the tax forward in the distribution chain. *Wagnon*, 546 U.S. at 103. Because the legal incidence of the tax fell off-reservation, the tribes were not immune from the tax simply because it was included by distributors in the price of the fuel they sold on-reservation. *Id.*

In 2007, to remedy the issues raised in the *Squaxin* ruling, Washington shifted the full burden of its fuel tax to suppliers. RCW 82.36.020(1); RCW 82.38.030(1). Under this statute, the legal incidence of Washington's fuel tax now falls expressly on suppliers and is imposed on the first taxable event in Washington. *See* RCW 82.36.010(12), .020(1), .026(5); RCW 82.38.030(1), (7), .035(6). *None* of the activities constituting the first taxable event – removing fuel from a refinery, removing fuel from the terminal rack, importing fuel from another state, or blending fuel – is

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6. In reaching its ruling, the *Squaxin* court noted that Washington's fuel tax (at that time) was legally required to be passed down the distribution chain to retailers. *See Squaxin*, 400 F. Supp. 2d at 1252-53. Suppliers and distributors would "simply collect and remit the funds" and would be "reimbursed for any deficiency." *Id.* at 1252. In contrast, retailers were not legally required to pass the fuel tax on to consumers, and were not entitled to a refund if a consumer failed to pay the tax. *Id.* at 1252-53.

conducted on any tribal lands. There is no requirement that the cost of the tax be passed down, but, as with the Kansas tax this Court considered in *Wagnon*, suppliers are permitted to include "as a part of the selling price an amount equal to the tax." RCW 82.36.026.[7]

This 2007 change in Washington law shifted Washington's fuel tax regime from one similar to Oklahoma's in *Chickasaw*, where the legal incidence fell on tribal retailers, to one like Kansas' regime in *Wagnon*, where the legal incidence fell on entities like Cougar Den and other suppliers and importers located off tribal lands.[8]

The Washington Legislature authorized the State to enter into compacts with tribes in that state usually refunding 25% of fuel taxes collected to the tribes to ameliorate any lingering adverse effect of Washington's fuel tax system on those tribes. Such fuel compacts were upheld by Washington's Supreme Court. *Automotive United Trades Org. v. State*, 357 P.3d 615 (Wash. 2015).

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7. The fuel tax is imposed at the first of the following transactions: (1) when fuel is removed from the terminal rack by a supplier and sold to a distributor; (2) when fuel is produced; (3) imported; or (4) blended in the State. RCW 82.36.020(2); *see also*, RCW 82.38.030(7). While the fuel tax is included in the price of fuel sold and delivered to tribal fuel retailers, the legal incidence of the tax is placed on suppliers (who are non-Indian) and the taxable event arises off reservation.

8. Washington consolidated its treatment of gasoline and diesel fuels into a single code chapter. Wash. Laws of 2013, ch. 225; Wash. Laws of 2015, ch. 228, § 40. That statutory change, effective in 2016, does not apply to the events in this case.

Cougar Den is subject to Washington's fuel tax in the same way as any other fuel supplier, or as any importer or distributor that buys fuel in another state and brings it into Washington is subject to taxation. The legal incidence of Washington's fuel tax as to Cougar Den unambiguously occurs off-reservation.[9]

(2) Neither Treaty Language Nor Federal Precedent Interpreting Travel Rights in Indian Treaties Creates a Right to Trade for Tribal Members

The Washington Supreme Court misconstrued the plain language of the Yakama treaty to find a "right

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9. At the time this litigation began, Cougar Den was a private wholesale fuel company owned by Richard "Kip" Ramsey, a Yakama tribal member. It never applied for or held any type of fuel license from Washington State in order to acquire gasoline or diesel fuel wholesale, although it obtained an Oregon fuel dealer's license in 2012, using that license to purchase gasoline and diesel wholesale in Oregon. It avoids Oregon fuel taxes because it exports that fuel. ORS 319.240. *See* petitioner br. at 9-10.

In March 2013, Cougar Den began exporting fuel from Oregon into Washington. It contracted with a trucking company, KAG West, to pick up its fuel in Oregon and transport it into Washington. Cougar Den then imported millions of gallons of fuel in 2013 without paying Washington taxes.

Cougar Den provided more than 90 percent of its fuel to two gas stations called Wolf Den and Kiles Korner in Wapato, Washington. Wolf Den and Kiles Korner sell retail fuel to the general public. Cougar Den provided the remainder of the fuel to businesses owned by Ramsey in White Swan, Washington. Before April 2013, those retailers purchased fuel from Washington-licensed fuel suppliers who paid Washington fuel taxes.

to trade" that was *nowhere* to be found in the treaty language. *See, e.g., Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1019 (Wash. 2017) ("We hold that the right to travel provision in the treaty protects the Tribe's historical practice of using the roads to engage in trade and commerce."). This construction contravenes this Court's long-standing emphasis in *Chocktaw Nation of Indians v. U.S.*, 318 U.S. 423, 432 (1943); *Nw. Bands of Shoshone Indians v. U.S.*, 324 U.S. 335, 353 (1945) on the enforcement of plain treaty language as written. The petitioner's brief at 21-39 is entirely correct in arguing that the treaty language does not support the Washington court's construction.

Amici are concerned not only because the Washington court's opinion is inconsistent with controlling case law, but, as shown in section (4), that legal error directly harms the *amici* who must compete with fuel businesses that can, through a Yakama distributor, deal in fuel with the extraordinary competitive advantage of avoiding Washington State's fuel taxes.

For example, this Court's case law was properly applied by the Ninth Circuit, rejecting such a right in interpreting the *same provision* of the *identical treaty* in *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1452 (2015).[10]

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10. Apart from a different product being at issue, the facts in *King Mountain* and this case are essentially identical. King Mountain Tobacco Co. was owned by an enrolled Yakama tribal member. It initially bought tobacco in North Carolina and processed it there. It then brought the processed product back to Washington State where it was then sold on the reservation and throughout the state and 16 others. King Mountain asserted it

In addressing article III of the treaty, the Ninth Circuit stated: "As shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* at 996. That court further concluded "the Treaty is not an express federal law that exempts King Mountain from state economic regulations" and "there is no right to trade in the Yakama Treaty." *Id.* at 997, 998."

The Washington court also misread the Ninth Circuit opinion in *United States v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007). *Smiskin* does not aid Cougar Den's position. In *Smiskin*, a criminal prosecution for trafficking in illegal cigarettes, the Ninth Circuit held that a pre-transport notice requirement for moving cigarettes was a condition on travel that was inconsistent with article III of the Yakama treaty, 487 F.3d at 1264-66, relying on its earlier rulings in the *Cree* cases that the treaty preempted state truck license fees. No such travel-related fee is at issue here. Moreover, the *Smiskin* court *nowhere* recognized a broad-based right to travel as did the Washington court.

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was exempt from a Washington State health-related assessment pursuant to a Master Settlement Agreement between the states and tobacco manufacturers, or, alternatively, a tax in lieu of that assessment. 768 F.3d at 991-92.

11. The *King Mountain* court's analysis flowed from a number of prior Ninth Circuit decisions analyzing the very same provision of the very same treaty. *See Cree v. Waterbury*, 78 F.3d 1400 (9th Cir. 1996) (trucking license fees were subject to Yakama treaty); *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (truck license and overweight fees subject to Yakama treaty); *Ramsey v. U.S.*, 302 F.3d 1074, 1080 (9th Cir. 2002) (upholding federal diesel fuel tax from Yakama treaty challenge).

See also, United States v. Fiander, 547 F.3d 1036 (9th Cir. 2008); *U.S. v. Wilbur*, 674 F.3d 1160, 1180-81 (9th Cir. 2012) (rejecting broad right to trade in Swinomish treaty).

Simply put, there is no right to trade in the treaty at issue. The applicable treaty provided that Yakama tribal members had the right to travel on public highways like any other citizens, free of specific fees for such rights; no such fee was imposed here.[12]

(3) This Court's Precedents on Taxation of Tribal Activity Off-Reservation Permit the Imposition of the Tax on Cougar Den

As noted in the petitioner's brief at 18-21, a cardinal principle of this Court's Native American treaty jurisprudence that tribal members acting outside of the reservation are subject to the very same taxation obligations as are nontribal citizens of a state. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe, supra* at 148-49. Again, the *very same treaty* has been interpreted by this Court to support this analysis. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), this Court also rejected the notion

12. As noted *supra*, Washington imposes a tax on wholesale fuel when it enters the state or is removed from a bulk facility in the state, and the person taxes is the fuel owner. RCW 82.36.010(16), 82.38.020(26), 82.36.020(2), and 82.38.030(7). The agency's final order specifically found that the tax is "not a charge for Cougar Den's use of public highways. ... Cougar Den is being taxed for importing fuel." Final Order CL 20.

that a Yakama tribal concern could sell cigarettes free of Washington State taxation, stating that a "State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Id.* at 151.[13]

It is no different here. The treaty at issue merely secured for Yakama tribal members a right to "travel upon all public highways" in common with all other citizens of the United States. It did not forestall application of a nondiscriminatory state tax law applicable to all Washington citizens off-reservation. This is particularly true where the incidence of the tax on Cougar Den is plainly off-reservation.

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13. In *Colville*, federally licensed Native American traders engaged in on-reservation sales, predominantly to nontribal members, of cigarettes supplied by several Washington tribes. The tribes imposed a tax largely on cigarette purchasers. Washington State also imposed a tax on cigarette purchasers. The low sale price of untaxed cigarettes was the only reason purchasers journeyed to the reservation. If the Washington tax were collected, on-reservation cigarette purchases by nontribal members would end. The tribes argued that while both the tribe and Washington State had an interest in taxing to raise revenue, federal law supporting tribal self-determination and economic development preempted the State's interest. This Court rejected both arguments.

This Court held that the State could tax cigarette sales by a tribe to non-Indians and nonmember Indians even though sales to tribal members were not taxable by the State and the tribe imposed its own tax. *Id.* at 155-56, 160-61. The state taxes were not preempted by federal law and did not interfere with tribal self-government. *Id.* at 155-56. The State could legitimately seize cigarettes off-reservation that failed to meet Washington State taxation requirements. *Id.* at 161-62.

(4) The Washington Court's Treaty Interpretation Will Have a Major Impact on State Transportation Revenues and an Anti-Competitive Impact on Other Fuel Retailers

A construction of the Yakama Treaty recognizing a "right to trade" that forestalls imposition of a non-discriminatory fuel tax whose legal incidence is off-reservation will have a profound impact on a variety of state taxes. The Washington court's treaty construction and Cougar Den's position will provide a huge competitive advantage to tribal businesses over nontribal competitors who would not enjoy the same tax exempt status claimed by such tribal businesses. While petitioner has explained how this Yakama argument leads to tax avoidance from coast to coast, *amici* explain *infra* how that tax immunity will impose significant harm on competing nontribal businesses.

(a) Effect on Washington State Transportation Budget

In 1944, responding to concern that gasoline excise tax revenues were being diverted from street and highway improvement to non-highway uses, the citizens of Washington enacted article II, § 40 of the Washington Constitution.[14] This amendment provides that motor vehicle

14. The historical impetus to prevent diversion of gas tax revenue found its source in the terrible state of highway transportation systems in the 1930's. *Rogers v. Lane County*, 771 P.2d 254, 256-58 (Or. 1989). To remedy the problem, a number of states earmarked revenue from gasoline and motor vehicle-related taxes to be used exclusively for highway purposes. *Id.* at 540. Nevertheless, legislatures continued to divert the funds. Washington voters enacted the 18th Amendment to keep motor fuel taxes dedicated to their intended purpose.

license fees and excise taxes on the sale, distribution, or use of motor vehicle fuel must be used "exclusively for highway purposes." Wash. Const. art. II, § 40. To that end, such revenues are placed in a motor vehicle fund ("MVF") separate from the State's General Fund, RCW 46.68.070. The Washington Legislature appropriates from the MVF to sustain the State's biennial transportation budget that funds both transportation operational needs and capital projects. *See, e.g.*, Wash. Laws of 2017, Ch. 313; Wash. Laws of 2018, Ch. 297.

Article II, § 40 is very prescriptive as to what constitutes a "highway purpose." Funds from motor vehicle fuel excise taxes may only be spent on road-related purposes and no others.[15] As early as 1951, in

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15. Washington Constitution article II, § 40 states:

> All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:
>
> (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
>
> (b) The construction, reconstruction maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public

State ex rel. Bugge v. Martin, 232 P.2d 833 (Wash. 1951), the Washington Supreme Court held that the use of the MVF monies was confined to highway purposes. *See also, Automobile Club of Washington v. City of Seattle*, 346 P.2d 695 (Wash. 1959) (MVF could not be used to satisfy tort judgments); *Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.*, 367 P.2d 605 (Wash. 1961) (cost of relocating utility facilities on rights-of-way not a highway purpose); *see also, State ex rel. O'Connell v. Slavin*, 452 P.2d 943 (Wash. 1969) (maintenance of a public transportation system not a highway purpose). Indeed, consistent with that interpretation, the Washington Attorney General has also formally opined that the 18th Amendment requires an excise tax on gasoline to be placed in the MVF. WA AGO 2001 No. 2.

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highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;

(c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section:

Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

The policy underpinning the 18th Amendment is unambiguous: its framers wanted to ensure that that motor vehicle license fees and fuel taxes were used to construct and maintain highways, roads, and streets. *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 616 (Wash. 1999).

Cougar Den's activities impact Washington State fuel tax revenues, diminishing funds available for necessary transportation operations and capital projects at a time when Washington transportation needs are not being met due to lagging revenues.[16] In fact, Cougar Den's circumvention of Washington fuel taxes is estimated to have cost the MVF (and transportation projects in Washington State) nearly $45 million in transportation revenues between March 2013 and the present. It evaded payment of Washington State fuel taxes on 99 million gallons of fuel, representing $45 million in revenues lost to the State.

Moreover, Cougar Den has actually expanded its operations since the start of this action. It has rebuilt its Wapato, Washington location, adding six more gasoline dispensers. It has expanded its facility to accommodate more trucks by providing a new truck stop building, a new fuel canopy, and additional fuel tanks. Thus, Cougar Den itself will expand the volume of fuel dispensed off-reservation in Washington that evades Washington's fuel taxes.

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16. Washington policymakers have even considered a tax on the miles driven by vehicles as an alternative to excise taxes on fuel, as MVF revenues chronically lag behind transportation construction costs. https://www.seattletimes.com/seattle-news/transportation/washington-state-to-test-pay-by-the-mile-as-a-way-to-fund-highways/.

Additionally, if the Washington Supreme Court's opinion is affirmed, there is literally nothing to stop other tribally affiliated suppliers from emulating Cougar Den's action, entering the market and circumventing Washington fuel taxes. That construction will also cause harm in other states where taxes are imposed on fuel or other goods that enter into a state by roadway.[17]

The impact on Washington State transportation revenues, and those of other states, will be nothing short of catastrophic. *Amici* are concerned that as fuel tax revenues decline with this virtual tax immunity for Cougar Den and others similarly situated, Washington policymakers will seek to remedy such revenue losses by exotic tax schemes aimed at tax-paying businesses like *amici*.

(b) Effect on Cougar Den's Nontribal Washington State Competitors

News accounts of this case indicated that tribal fuel retailers (including Cougar Den itself) or retailers purchasing from Cougar Den enjoyed a 20 cent per

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17. The incentive for other tribal fuel importers and other wholesalers to enter this market is patent. This is not a theoretical concern. For example, First American Petroleum is engaging in similar conduct in California. http://www.firstamericanpetro.com/about-us/. The Nez Perce tribe has a similar treaty provision. 392 P.3d at 1024 n.11. Indeed, as the Washington court dissent noted: "A simple extension of the majority's logic would allow ***nontribal members*** to avoid the imposition of state use, excise, or sales tax on goods they consume through a contrived transport by Yakama Nation or Nez Perce tribal members." *Id.* (emphasis in original) (Fairhurst, J., dissenting).

gallon advantage over other retailers when Washington State's fuel tax was at 37.5 cents per gallon.[18] That tax rate increased since the time of the proceedings below to 49.4 cents per gallon, making the pump price disparity between retailers purchasing from entities paying the Washington tax and those purchasing from Cougar Den ever the greater, as recent news accounts documents.[19]

WOMA's members who purchase fuel in Oregon must obtain a fuel importer license, and pay Washington's fuel tax. Cougar Den, and any other similarly situated tribal fuel importer, do not. WOMA members are competitively disadvantaged; they simply cannot compete with a business like Cougar Den or its on-reservation retail customers, who sell the identical fuel as *amici*, but can do so while evading Washington State's fuel taxes.

Nontribal WOMA members have explained how this harm occurs and its effect on disadvantaged businesses. In testimony before the Washington State Senate Transportation Committee on Senate Bill 6193, Rod Smith, the vice president of RH Smith Distributing,

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18. http://www.yakimaherald.com/ news/ local/ gas- tax- fuels-debate- between-yakama-nation-state/article_8a9006b8-0116-11e5-b9b1-d75098f93ee7.html; http://www. yakimaherald.com/news/ business/local/does-state-gas-tax-apply-on-yakama-reservation-judge-will/ article_425f31a2-2ddf-11e5-9941-3fff12e36503.html; http://www.yakima herald.com/news/crime_and_courts/judge-s-ruling-expected-to-favor-treaty-rights-in-gas/ article_866c7922-30c8-11e5-b81c-d7d4d9013cea.html.

19. https://www.tri-cityherald.com/news/local/ article214070264.html (while gas prices in Washington were close to $3.43 per gallon, Cougar Den was selling gas at its White Swan, Washington outlet at $2.92 per gallon).

a family-owned fuel distribution company based in Washington State's Yakima Valley, and a WOMA member, provided this written testimony:

> Our company used to own a convenience store which sold fuel in Toppenish. Today it is closed and the fuel tanks are removed. We could not compete against the local Yakama tribal stations who today have a 45 cent per gallon buying advantage under our cost!! Customers will drive miles just to save a few pennies per gallon when shopping for fuel. How do businesses like ours, who are required to pay all the state taxes and fees, complete with a 45 cent per gallon disadvantage??

See www.tvw.org/watch/?clientID=9375922947&eventID=20160100 84& autostartstream=true. *See also,* http://lawfilesext.leg.wa.gov/biennium/ 2015-16/Pdf/Bill%20Reports/Senate/6193%20SBR%20TRAN%2016.pdf (official bill report).

Mr. Smith reports now that nontribal fuel outlets in Yakima and Yakima Valley cannot compete with Cougar Den given low posted retail fuel prices that draw in customers who shop for the lowest fuel price for their cars and trucks. The Yakama tribal-owned stations, all now supplied by Cougar Den and their fleet of trucks, always post the lowest prices in the area, according to Smith. Cougar Den leveraged its advantage and expanded into the fuel hauling business, owning its own trucks. The severity of the competitive disadvantage for retailers not purchasing fuel from Cougar Den is clear.

Similarly, WANS members are similarly disadvantaged in fuel sales. But the Washington Supreme Court's treaty interpretation will also impact other areas of commercial activities, particularly tobacco sales by WANS convenience store members. Should that court's treaty construction hold, tribal businesses will circumvent Washington State's high tobacco taxes, running afoul of contrary Ninth Circuit precedent.[20] The theory behind Cougar Den's activities may even extend into other unexpected commercial activities. *See, e.g.*, Melinda Smith, *Native Americans and the Legalization of Marijuana: Can the Tribes Turn Another Addiction into Affluence?*, 39 Am. Indian L. Rev. 507 (2014/15). Washington State legalized the recreational use of marijuana in 2012 by initiative. Wash. Laws of 2013, ch. 3.

E. CONCLUSION

The Washington Supreme Court's interpretation of the Yakama treaty that disregards its plain language should be reversed because it erroneously expands the applicable treaty language ensuring that tribal members can access transportation facilities into a "right to trade" found

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20. *E.g.*, *King Mountain*, 768 F.3d at 998 (state cigarette escrow payments); *U.S. v. King Mountain Tobacco Co., Inc.*, 2015 WL 4523642 (E.D. Wash. 2015) (federal tobacco assessments); *King Mountain Tobacco Co., Inc. v. Alcohol & Tobacco Tax & Trade Bureau*, 996 F. Supp. 2d 1061 (E.D. Wash. 2014), *rev'd*, 843 F.3d 810 (9th Cir. 2016); *Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258 (E.D. Wash. 2010), *aff'd*, 658 F.3d 1078 (9th Cir. 2011). *See also*, *Matheson v. Wash. State Liquor Control Bd.*, 130 P.3d 897 (Wash. App.), *review denied*, 158 Wn.2d 1023 (Wash. 2006) (upholding state cigarette excise tax on unlicensed Native American retailer selling cigarettes to other tribes).

nowhere in the treaty language. This misconstruction defeats the legitimate application of a nondiscriminatory state fuel tax whose incidence falls off reservation and will effectively blow gaping holes in the fuel tax revenues and transportation budgets of Washington and other states. It will allow tribal fuel suppliers an unfair advantage over nontribal business competitors. It will also create a precedent for tribal retailers of other products that this Court should not countenance.

This Court should reverse the decision of Washington's Supreme Court.

DATED this 15th day of August, 2018.

Respectfully submitted,

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